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ABSTRACT

This document presents testimony and prepared statements concerning the legality of race specific student financial aid, the change in federal policy initiated by the Department of Education when, in December 1990, it declared such aid illegal, and the process used to change the policy. The questions addressed included how the policy change came about, who was behind it, and how it will affect the way U.S. colleges and universities conduct business. Among those presenting testimony during the first session of the hearing were the following: Lawrence Gladieux, Washington director, the College Board; Richard Rosser, president, National Association of Independent Colleges and Universities; Dr. Ted Shaw, University of Michigan; Hon. Ted Weiss, House of Representatives, who chaired the hearing, and Michael L. Williams, Assistant Secretary for Civil Rights, U.S. Department of Education. The second day's session was entirely given over to questioning by chairman Weiss of two Department of Education witnesses, Michael Williams and Richard Komer, the Deputy Assistant Secretary for Policy. Prepared statements submitted for the record came from Donald M. Stewart, president, the College Board; and Richard Rosser. (GLR)

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DEPARTMENT OF EDUCATION'S RACE-SPECIFIC
SCHOLARSHIP POLICY

ED342340

HEARINGS
BEFORE THE
HUMAN RESOURCES AND INTERGOVERNMENTAL
RELATIONS SUBCOMMITTEE
OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES
ONE HUNDRED SECOND CONGRESS
FIRST SESSION

MARCH 20 AND 21, 1991

Printed for the use of the Committee on Government Operations

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(11)

CONTENTS

	Page
Hearing held on:	
March 20, 1991	1
March 21, 1991	75
Statement of:	
Gladieux, Lawrence, Washington director, the College Board, on behalf of Donald M. Stewart, president	58
Rosser, Richard, Ph.D., president, National Association of Independent Colleges and Universities	38
Shaw, Dr. Ted, professor of law, University of Michigan	33
Weiss, Hon. Ted, a Representative in Congress from the State of New York, and chairman, Human Resources and Intergovernmental Rela- tions Subcommittee: Opening statement	1
Williams, Michael L., Assistant Secretary for Civil Rights, U.S. Depart- ment of Education, accompanied by Richard Koner, Deputy Assistant Secretary for Policy	3, 76
Letters, statements, etc., submitted for the record by:	
Rosser, Richard, Ph.D., president, National Association of Independent Colleges and Universities: Prepared statement	42
Stewart, Donald M., president, the College Board: Prepared statement	60

APPENDIX

Statements submitted for the hearing record	101
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DEPARTMENT OF EDUCATION'S RACE-SPECIFIC SCHOLARSHIP POLICY

WEDNESDAY, MARCH 20, 1991

HOUSE OF REPRESENTATIVES,
HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2203, Rayburn House Office Building, Hon. Ted Weiss (chairman of the subcommittee) presiding.

Present: Representatives Ted Weiss, Donald M. Payne, Patsy T. Mink, Craig Thomas, David L. Hobson, and Bernard Sanders.

Also present: James Gottlieb, staff director; Marc Smolonsky, professional staff member; Mitchell Zeller, associate counsel; Ann Marie Atkins, staff assistant; and Stephen D. McMillan, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN WEISS

MR. WEISS. The Subcommittee on Human Resources and Intergovernmental Relations is now in session. I'm pleased to note that our distinguished minority ranking member, Mr. Thomas, is with us, and after I make my opening remarks, he will then make whatever remarks he chooses to make.

Before I make my opening remarks, let me take note of the appointment of Lamar Alexander as the new Secretary of Education, and to indicate how pleased I am by that appointment. I had the pleasure and privilege of serving with Mr. Alexander on the Advisory Commission of Intergovernmental Relations and consider him to be an outstanding public servant.

And I think that the President really needs to be commended for making that appointment.

I also want to state that, as I told the Secretary in a conversation that we had yesterday, that, obviously, this hearing has nothing to do with anything that he may be thinking of doing about this issue. What we're into is the process as to the decision that was announced on December 4, 1990. Clearly, he was not in the Department of Education, in any capacity, at that time. And so I just want that to be publicly clear as well as privately clear.

I expect that the Secretary will be reading a transcript of these hearings, and perhaps, on the basis of his following what comes out in today's hearing, because he said that he's going to put everything on hold for 6 months—I think, at a press conference that he

(1)

held this morning—so that the policy before December 4 will be in effect for 6 months. Perhaps he will conclude, after these hearings, that the old adage really holds, which is that “if it ain’t broke, don’t fix it.”

In any event, on December 4, 1990, the U.S. Department of Education abruptly declared that minority scholarships were illegal. There was no attempt to assess the harm this switch in law enforcement would cause, nor to determine how many students would be affected.

The Department chose to establish its new policy in a case involving promoters of a college football game in Arizona, the only State that had voted not to celebrate Martin Luther King’s birthday as a holiday. The promoters of the Fiesta Bowl had hoped to use race-specific financial aid to correct the tarnished image Arizona’s vote against the civil rights holiday had left on the State. The Department’s timing could not have been more inappropriate.

On December 18, after a firestorm of protest, the Department seemed to back off its position, but not really. Even after their “modification,” colleges and universities still cannot use their own funds to pay for race-exclusive scholarships.

Today we will review the process that was used to change Federal policy. The actions of the Department of Education are extremely important, because cultural and economic conditions that restricted minority students from entering colleges remain. Minority students continue to lag far behind their white counterparts in percentages of high school graduates entering college.

Two years ago, this subcommittee prepared a report that found many State affirmative action plans to be poorly funded and enforced half heartedly. The plans were not working because there was simply not enough commitment to do more. Despite overwhelming evidence that the plans had failed, the Department of Education did away with many of those affirmative action plans, and now it wants to worsen the damage by eliminating yet another method to correct illegal discrimination.

Today, we will learn how this policy change came about, who was behind it, and how it will affect the way our colleges and universities conduct business. I want to emphasize, again, that we are reviewing past actions of the Department that in no way reflect on the new Secretary of Education, who has already expressed his objections to the ban on minority scholarships.

The first witnesses are scheduled to be Michael L. Williams, Assist Secretary for Civil Rights at the Department of Education, and his Deputy Assistant Secretary for Policy, Mr. Richard Komer. We will also hear from University of Michigan law professor Ted Shaw, the College Board, and the National Association of Independent Colleges and Universities.

But before we go to our witness, let me call on Mr. Thomas for his opening comments.

Mr. THOMAS. Thank you very much, Mr. Chairman. First, let me tell you how pleased I am to be able to serve with you on this committee, and I’m looking forward to exploring many areas of mutual concern during the year. I want to thank you, also, for holding this meeting, and Mr. Williams, you for being here.

There are few issues in this country as important as guaranteeing quality educational opportunities to all Americans. The hearing this morning, combined with the announcement of the Department of Education, will give us a good opportunity to look into this matter.

Civil rights is a complicated issue, as complicated as any as we will face during this Congress, placed at the top of many agendas, albeit for different reason. But an important point needs to be made. Both President Bush and the Congress are committed to equal opportunities in employment, education, and housing. Differences in how we achieve those goals cannot and should not be construed as disagreement over the goals themselves.

The decision by Mr. Williams and the Office for Civil Rights, and subsequent statements during the 2 weeks following, did create some confusion, and I am pleased that he's here to discuss that with us today. I'm also pleased with the Secretary's decision to become more active in this issue, to ensure that the needs of all Americans, regardless of color, sex, or national origin, are met and their rights protected.

His statement, this morning, in detailing the process of the Education Department intends to follow in reviewing this issue, appears to provide a solid foundation. He will provide a much needed overview of current programs, encourage the participation of outside groups and Congress in deciding how to improve our efforts and provide protection to both institutions and recipients who are already benefiting from current programs.

The Secretary has a well-deserved reputation for being a leader in the field of education, both from his days as Governor of Tennessee, and, more recently, as president of that State's largest university system. He brings with him a fresh perspective to a difficult job. I'm confident that his forthright manner will produce results that all of us can agree upon.

Once again, Mr. Chairman, thank you for holding this hearing. I'll look forward to the testimony of the panel.

Mr. WEISS. The policy of the Government Operations Committee and its subcommittees is to swear in all of its witnesses, so before we proceed any further, Mr. Williams, will you stand and raise your right hand?

[Witness sworn.]

Mr. WEISS. Before I go to questions, Mr. Williams, the letter that was sent to you on February 28, from the subcommittee, over my signature, requested that the Deputy Assistant Secretary for Policy join you this morning. Is that person here?

**STATEMENT OF MICHAEL L. WILLIAMS, ASSISTANT SECRETARY
FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION**

Mr. WILLIAMS. Mr. Chairman, he is not here.

Mr. WEISS. And that person is—

Mr. WILLIAMS. His name is Richard D. Komer.

Mr. WEISS. OK. You understand that an invitation for a witness who is employed by the Federal Government, to come before an appropriate committee of Congress is not really an invitation which can be lightly disregarded. I would hope that Mr. Komer would

appear within a matter of brief occasion, because we have some questions prepared for him, in this process, and, so he is an essential part of this morning's hearings. So perhaps one of your staff people can get on the phone and urge Mr. Komer to come here on the base of the invitation, rather than by the legal process.

Mr. WILLIAMS. As the Assistant Secretary, Mr. Chairman, I am here, willing to answer your questions, and I will attempt to answer those that would be propounded to Mr. Komer.

Mr. WEISS. I don't know if you understood what I said. If Mr. Komer does not show up on the base of the invitation, we will subpoena him to come. Now, we've rarely had to subpoena Federal employees; it shouldn't be necessary. Congress has the right to have Federal employees appear before it. So I would urge you, before we get to the questions for Mr. Komer, to have one of your staff people call and have him come here.

Mr. Williams, give us your title, would you?

Mr. WILLIAMS. I'm the Assistant Secretary for Civil Rights, U.S. Department of Education.

Mr. WEISS. And when did you assume that position?

Mr. WILLIAMS. July 6, 1990.

Mr. WEISS. Does the Office for Civil Rights operate under the principle that this country has had a history of discrimination against minority students?

Mr. WILLIAMS. The Office for Civil Rights recognizes that there has been many forms of discrimination against minority students and other students, as well, Mr. Chairman.

Mr. WEISS. Over the years, the Department of Justice has sued State systems of higher education to force them to desegregate. Your own Office for Civil Rights has ordered higher education systems to desegregate. Federal courts have ordered school systems to desegregate. Were these actions ordered, under title VI of the Civil Rights Act, to eliminate the vestiges of the legal segregation?

Mr. WILLIAMS. In those instances, yes, Mr. Chairman, they were.

Mr. WEISS. Do you agree that many States' systems of higher education, at one time, had legally segregated schools that discriminated against black students, in particular; that the Supreme Court and the Congress said that those systems were illegal, and that any vestiges of those systems that still prevent minority students from having equal access to education must be eliminated?

Mr. WILLIAMS. I am aware of that.

Mr. WEISS. Does the Department's title VI regulation require that in the case of institutions and States that "previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Mr. WILLIAMS. In the regulation 100B362 does, in fact, say that a recipient of Federal funds that has discriminated in the past, must indeed take affirmative action to redress that discrimination.

Mr. WEISS. Does the title VI regulation require that, "Even in the absence of such prior discrimination, a recipient, in administering a program, may take affirmative action to overcome the effects of conditions which result in limiting participation by persons of a particular race, color, or national origin?"

Mr. WILLIAMS. The possibility, the permissibility of taking affirmative action for that recipient that is not a past discriminator, is, indeed, in the Federal regulations.

Mr. WEISS. Isn't it also true that in cases where no discrimination has been found, that not only is affirmative action allowable, but that title VI specifically permits race to be used as a criteria in providing such assistance as financial aid?

Mr. WILLIAMS. I think that when there is no discrimination in the past, that race can be a factor, and be deemed to be a factor that is an appropriate factor, and be looked upon by a Federal recipient of Federal funds.

Mr. WEISS. Yes, that's part of the regulations, also, isn't it?

Mr. WILLIAMS. Yes, it is.

Mr. WEISS. Last year, the promoters of the Fiesta Bowl football game created a Martin Luther King scholarship fund for minority students. On December 4, 1990, you informed the promoters of the game that awarding race-specific financial aid was now considered illegal by the Department of Education. You said that minority scholarships were a violation of title VI; is that correct?

Mr. WILLIAMS. No Mr. Chairman that is not correct. Let me, if I could, say what I did say on December 4. On December 4, I issued a letter to the president of the Fiesta Bowl and that letter addressed probably the two big questions in this issue. The why: Why do we need financial assistance? Obviously, because we need to provide opportunities for minority students to attend college. But it also addressed the how. And in going through the how—

Mr. WEISS. Mr. Williams, did you not say, in your letter to Mr. Junker, "OCR interprets these provisions as generally prohibiting race-exclusive scholarships, referring to Title VI?"

Mr. WILLIAMS. Yes, sir.

Mr. WEISS. You did say that.

Mr. WILLIAMS. And then it goes on further to outline the variety of ways—

Mr. WEISS. Right. OK. That's all I want at this point. Had the Department of Education ever before issued a formal finding that minority scholarships were illegal?

Mr. WILLIAMS. The Department had, indeed, issued findings before that race-specific activity had been illegal.

Mr. WEISS. That minority scholarships were illegal? That's the question. Had the Department ever issued a formal finding?

Mr. WILLIAMS. We provided technical assistance to Dartmouth College, in 1988, that provided them information that said that a scholarship designed exclusively for minorities would, indeed, be in violation of title VI.

Mr. WEISS. Now, again, I'm asking you if a formal finding had ever been issued by the Department, that minority scholarships were illegal? The answer to that is no; isn't it?

Mr. WILLIAMS. The answer is no, but the principle, the legal principle, the part in which we have addressed that, we have used in other matters.

Mr. WEISS. So that the Fiesta Bowl—well, tell me about those other cases. Which other cases?

Mr. WILLIAMS. Well, if we go back and look at, let's say, in 1986, we looked at a scholarship with regards to Southwest Missouri

State University, and looking at that scholarship, did, indeed, say that the principle that a university could only use race-specific activity when addressing or redressing past discrimination, was a principle that we applied in that instance, and it was the same principle that is outlined and reiterated in the letter on December 4.

Mr. WEISS. I don't know what that says. But anyhow, the Fiesta Bowl decision represented a significant change in your interpretation of title VI; isn't that correct?

Mr. WILLIAMS. I would disagree with that, sir.

Mr. WEISS. Do you think that the Fiesta Bowl statement and decision, in December 4's statement, doesn't represent a significant change in interpretation?

Mr. WILLIAMS. If I could: In the Fiesta Bowl letter, we outlined, I outlined a number of legal principles, legal interpretations, that the Department and the Office for Civil Rights had, indeed, used in the past, the first being that colleges and universities, institutions, could, indeed, use race to remedy for past discrimination; that's one principle that was in the letter; that is a principle that, again, had been used in the past.

We did also say, as we had said before, that private entities were not covered by title VI; that is a principle that the Office had dealt with in the past; that is a principle that is in the letter. We had also said, as you outlined, in terms of the regs, that an institution where there was a need to redress limited participation, could use race as a positive factor, the way the Court and *Bakke* discussed in 1978. That is a principle that had been used by the Department in the past; that is a principle that is in the letter.

Finally, we did in fact, in the past, in OCR, say that there may be other ways, a host of race-neutral criteria that institutions can indeed use in order to advance the educational opportunities of minority students; that is a principle that has been used in the past in the Office for Civil Rights; that is a principle that is incorporated in the letter of December 4.

Mr. WEISS. Did you consult with the Department or general counsel, in any way, before making your decision to prohibit race-specific scholarships?

Mr. WILLIAMS. Yes, sir. The letter went through a number of renditions, and around the 27th, 28th, or so, the letter, as well as the press release—the draft of the letter and the draft of the press release were sent from my office to the Office of the Secretary and the Office of the Deputy Secretary, and the general counsel's office had an opportunity to review both.

Mr. WEISS. And when was that?

Mr. WILLIAMS. Around the 27th or 28th of November.

Mr. WEISS. Of November?

Mr. WILLIAMS. Yes, sir.

Mr. WEISS. Did general counsel give you a written opinion on this?

Mr. WILLIAMS. No, sir.

Mr. WEISS. What did you get back from general counsel?

Mr. WILLIAMS. I received back comments on the way one or two of the first drafts had been written, there were handwritten com-

ments, and received back a telephone call from the general counsel, with his comments about phraseology in the letter.

Mr. WEISS. Do you have copies of those comments?

Mr. WILLIAMS. What we had at the time of your document request has been turned over to you. I do not have any other documents other than those.

Mr. WEISS. Did you receive any comment from the Office of the Deputy Secretary?

Mr. WILLIAMS. Yes. Somewhere prior to December 4, between the 27th and the 4th, I received a call from the Chief of Staff of the Secretary's Office, saying that the letter and the press release were fine, and to go ahead. I received a call from the Deputy Secretary's Office, around the 4th, to go ahead, as well.

Mr. WEISS. Nothing in writing?

Mr. WILLIAMS. I did not receive anything in writing.

Mr. WEISS. Did you consult with anyone at the White House or the Office of Management and Budget about the minority scholarship decision? Did you discuss the decision with anyone at the Department of Justice?

Mr. WILLIAMS. I did not. I think there may have been members of the staff that shared one of the first renditions of the letter with DOJ, because the University of Alabama is involved in litigation with the Department of Justice, and we wanted them to be appraised of it. But I did not, personally, share it with my counterpart at the Department of Justice, nor did I receive back anything in written form with their comments, if they had any.

Mr. WEISS. Let me see if I can get it clear for the record. Was a copy of the letter and the policy embodied therein forwarded to the Department of Justice for their comments?

Mr. WILLIAMS. It is my recollection that a copy of one of the earlier renditions of the letter was, indeed, sent to some staff person at the Department of Justice; that person, I do not know.

Mr. WEISS. Who, on your staff, sent it, do you know?

Mr. WILLIAMS. That, I would not know.

Mr. WEISS. And what the comments of the Department of Justice were, you also do not know.

Mr. WILLIAMS. That is correct.

Mr. WEISS. You provided the subcommittee with a draft memorandum entitled "Recipient Provisions of Race-specific Aid." In this memorandum, you outlined why you believe race-specific scholarships are illegal. In the draft, you state, "This memorandum supersedes all prior OCR policy documents on this subject;" is that correct?

Mr. WILLIAMS. That's correct.

Mr. WEISS. So that, in fact, when I asked you earlier whether, in fact, the Fiesta Bowl policy decision was a significant change in policy, when you said, "no," that's inaccurate, isn't it?

Mr. WILLIAMS. That draft that you're looking at, sir, has never gone out. We have not issued a draft policy to the staff of the Office for Civil Rights, as it relates to minority scholarships. That is a document that was in the process of being developed.

Mr. WEISS. But this is the policy that supports the Fiesta Bowl decision; isn't it?

Mr. WILLIAMS. That is a policy that was being developed at the same time as the Fiesta Bowl letter was developed, and it has in it the same legal interpretation that is in the letter.

Mr. WEISS. That's a draft memorandum to your staff; is that correct?

Mr. WILLIAMS. That would be, yes.

Mr. WEISS. They're aware that that, in fact, was your policy.

Mr. WILLIAMS. They would be aware that that is a policy that has been announced by the Office for Civil Rights, yes.

Mr. WEISS. According to the May 1, 1978, Federal Register, "The Office for Civil Rights will hereafter publish all major policy determinations in the Federal Register, and systematically provide copies to organizations representing beneficiaries and recipients of Federal financial assistance." Was that policy rescinded, and was notice of its rescission published in the Federal Register?

Mr. WILLIAMS. There was no attempt to announce national policy of general applicability, so the answer to that is no. The Fiesta Bowl letter was not an attempt to announce national policy, or to change policy, as it relates to this issue.

Mr. WEISS. Mr. Williams, how can you say that in the face of that draft memorandum.

Mr. WILLIAMS. The draft memorandum was never issued.

Mr. WEISS. Never mind that it wasn't issued, but how can you say that, in fact, there was no intent?

Mr. WILLIAMS. If we look at the letter, if we could, the first paragraph of the letter says to Mr. Junker, "I commend your efforts at advancing minority opportunities in education," and it goes on and lists the kinds of legal interpretation. But the last part of the letter says and talks about the provision of a senior attorney to the Fiesta Bowl, to provide technical assistance to them, to assist them, in developing scholarships with the University of Louisville and the University of Alabama that would advance the educational opportunities of minority students.

This was an effort to provide the Fiesta Bowl with technical assistance, so that they could then go about the business of providing educational scholarships to advance the educational opportunity for minority students; that's what this is. This was not an attempt—

Mr. WEISS. This is an effort to help the Fiesta Bowl people?

Mr. WILLIAMS. That's what the letter says, and that's what it says, clearly, on its face.

Mr. WEISS. Following the *Bakke* decision, the Department published, in the Federal Register, policy interpretations of the title VI regulation. Did you, at least, publish your December 4 policy interpretation in the Federal Register, as the Department did after *Bakke*?

Mr. WILLIAMS. No, because it was not an attempt to announce policy of general applicability.

Mr. WEISS. Well, I have to draw the conclusion that you believe that major changes in enforcement policy should no longer be publicly reviewed.

Mr. WILLIAMS. That would not be the case, Congressman.

Mr. WEISS. Why do you think that the whole Nation, as least the academic sector and the civil rights sector, get so upset at the decision, in your view?

Mr. WILLIAMS. There are probably a lot of variables that go into it. Quite frankly, I'm probably not the best person to do that; some of the people who got upset may be in a better position. But, if I could, let me see if I can muse a bit. I think to some extent, on the "why" side, there is, indeed a great need for us, as a Nation, to provide opportunities for a wide variety of students, particularly disadvantaged students, and even more particularly, for minority students, to go on and obtain an education.

A letter that came out, which is fairly innocuous, I think, to most people, was followed sometime later with discussions in the public that it was a ban on minority scholarships, and that minorities could not go to school. But, clearly, in the letter, there are enunciated ways in which scholarships could be provided to minorities.

I think people got scared. I think people became afraid that minority students would not be able to go to school. I think that happens when someone puts a microphone and a camera in front of the face of a young, black student and says, "What do you think about the Department of Education trying to take away your scholarship?" when, indeed, that's not what the letter said. And I think there was fear.

I also think that there were a number of things that went on. I think that, as you mentioned, there are a number of States, that, in their higher education systems, had been declared to have been discriminating, and those States can, and, indeed, do and have race-specific, minority-specific scholarships.

And other schools, not for the same legal basis, but seeing, maybe, the school across the street, what the University of Texas was doing, and, because they had been a discriminator, by State—maybe a private school, in the same State, saw what the University of Texas was doing and started doing it as well, not looking at the legal basis for why the University of Texas was doing it.

And so I think, what happened, there was a confluence of a lot of things, but I do not think it is necessarily because what I did was to announce a change in policy. That is not what we did, and that was not what we intended to do.

Mr. WEISS. I must say, it sort of confuses me, as to what the Secretary is going to be reviewing. I understood that he was reviewing the whole policy change to see what should be done with it.

Mr. WILLIAMS. If I could, I think what the Secretary wants to do—we were, or more specifically, I was, roundly criticized for having appeared to have made a decision without consulting the higher education community and the civil rights community, without having done impact analysis to determine what the impact would be, without having done what Dr. Rosser, I understand, has done, finding out how many scholarships there are and what the numbers are.

And there is an opportunity here, which I think the Secretary is seizing upon, to do that. We have not attempted to announce policy of general applicability, but to so, at some future date, after having gone through an orderly process.

Mr. WEISS. As a matter of fact, I understand that the Secretary has said that for 6 months, everything will be on hold, and the policy decision, or change, announced on December 4 will be abeyance until he gets through with his review; isn't that correct?

Mr. WILLIAMS. That is correct.

Mr. WEISS. So that, in fact, he is putting that policy change, which you announced on December 4, on hold. To say that means that you have to assume that there was a policy change which has to be held in abeyance.

Mr. WILLIAMS. I do not think that's what the Secretary is saying.

Mr. WEISS. Well, OK. Tell me, if you know: What are the civil rights requirements, in regard to the Administrative Procedure Act?

Mr. WILLIAMS. I am not aware of them.

Mr. WEISS. Well, let me tell you, "Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act." And the question that I have then is: Does the title VI regulation meet the Administrative Procedure Act's definition of a rule?

The answer to that is yes. Under section 2C, a rule is defined as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, or describing the organization, procedure, or practice requirements of an agency." Now, did your December 4 policy statement on minority scholarships change the way the Department interpreted and enforced this title VI rule?

Mr. WILLIAMS. It did not, and it was not intended to be a policy statement.

Mr. WEISS. Section 553 of the Administrative Procedure Act requires major policy changes—and I have to assume from the Secretary's news release and press conference that, in fact, he considers it to be a major policy change that he's reviewing. The Administrative Act requires major policy changes to be subjected to notice and comment rulemaking, prior to their becoming final agency policy. Did you promulgate your new rule, prohibiting minority scholarships, according to section 553 of the Administrative Procedure Act, as required by the law?

Mr. WILLIAMS. No, it was not an attempt to announce national policy.

Mr. WEISS. Were you aware at the time that you adopted the policy—whatever it was that you consider it to be—that it would alter the way just about every college, university, and State system of higher education conducts business?

Mr. WILLIAMS. No.

Mr. WEISS. At this point, I'm going to yield. I have further questions, but let me yield to Mr. Thomas, and let me recognize the presence of one of our distinguished members on the majority side, Mr. Donald Payne of New Jersey.

Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman. I'm a little bit confused, perhaps you can help me. What is the difference between the current policy of the Department, with regard to this issue, and the policy 3 months ago?

Mr. WILLIAMS. At the present time, we are encouraging colleges and universities to do that which they were doing 3 months, 4 months, whatever time ago, and to participate with the Department in the review that's being conducted now, and to await any decision that the Department may make 6 months, or so, from now. And so, at this point, it is full steam ahead, go ahead and do those things that you had been doing.

Mr. THOMAS. I guess that's what I assumed. I'm not quite sure what we're after, because the policy, in fact, hasn't changed; isn't that—

Mr. WILLIAMS. To talk about what the policy may be in the future would be, to some extent, prejudged—

Mr. THOMAS. I'm talking about today; I'm not talking about the result of what the Secretary has now suggested be done.

Mr. WILLIAMS. No change at all.

Mr. THOMAS. No change. I read the Secretary's statement here, and I don't think he commented on the change. Indeed, he commented on 10 years of different kinds of regulations, to evaluate them and to come forth, then, with the position of the Department; is that correct?

Mr. WILLIAMS. I think it is probably fairer, in terms, to discuss what I think the Secretary's intending, but, obviously, he would be in a much, much better position to address what he's thinking than I would be. But he's saying that they're—what we want to do is to get to the place where there is a policy. I do not see that as having been a critique, one way or another, on December 4 or even December 18. It is a process to get to what would be a policy that would be a policy that would be consistent with title VI of the Constitution.

Mr. THOMAS. In the past, the Office for Civil Rights and the Department has upheld cases that permitted race-based programs that benefited blacks and other minorities. Could you explain how the programs differed from the situation involved with the Fiesta Bowl?

Mr. WILLIAMS. Well, the principles may have been the same, I mean, we did, in fact, on one or more occasions, look at scholarship programs and approve those when those programs were for the benefit of minority students. One that would come to mind immediately would be in 1989, where the Department approved a scholarship that you would be well aware of, a scholarship created and established by this Congress, the official Roberts Harris Scholarship. And the underlying theme, while it is a theme that was not recognized in that finding, the underlying theme is that Congress has certain powers to engage in affirmative action that maybe States or colleges, universities, don't have.

And, so there have been a wide variety of basis, and that's what the framework of the review is: to identify what are the appropriate bases, to determine when it is proper to have race conscious activity.

Mr. THOMAS. In your letter—and I'm not sure if you had a chance to fully explain it—as I recall, you set forth some procedures in which they could accomplish the goal that they had initiated. Would you explain how you provided to do that?

Mr. WILLIAMS. There are two principles, and one that I just mentioned. I mean, Congress, obviously, when it creates a scholarship has certain powers to do that. A second one is that private entities, if they are not recipients of Federal education aid, then, obviously, they can go ahead and create race-specific scholarships. IBM could do it, Pepsi-Cola could do it, without a violation title VI.

But when we look at the colleges and universities themselves, one of the ways is that the law recognizes that discriminators ought to redress and remedy past discrimination. And that is one of the things that is mentioned in the letter. We know, as I mentioned earlier, my State of Texas is one of those States that is a past discriminator. While some of us may not like that idea, that happens to be the fact.

And so the State of Texas, having been a past discriminator, is in a position to remedy and use race-specific conduct to do that. The interpretation of the thinking that went into the letter is that, applying the principles of the *Bakke* case, that say that you can use race as a factor among other factors to redress when we've identified that maybe a race—there's under-representation and things of that nature.

But it says that each individual still must be able to compete for each financial aid opportunity for each scholarship, but race can, indeed, be a factor. And then the last element that was in the letter is that, obviously, we can use race-neutral criteria. We can have scholarships for the low income, or scholarships for students from single parent homes, or scholarships for students from school districts that have not performed well: Race-neutral criteria.

And even if, in using that criteria, an overwhelming number of those individuals end up being minorities, then that, in the interpretation of December 4, would be consistent with title VI.

Mr. THOMAS. In your judgment, would that be the case: If those kinds of criteria were used, the overwhelming number of recipients would be minorities?

Mr. WILLIAMS. I'm not sure, I would imagine a demographer would tell us that probably, if we looked at the economically disadvantaged, if we looked at people from poor school districts or poor schools, if we looked at people who came from families that were having some kind of suffering or some kind of disarray, that a good portion of those would, indeed, be minorities. And some minority students would, indeed, benefit from scholarship programs designed in that fashion. But the law doesn't say that scholarship programs have to be race neutral.

And that's one of the reasons, Congressman, why it is somewhat disconcerting to hear the notion that what I said on December 4 was that minority students couldn't go to college, because there are any number of ways that even the December 4 letter identifies, that could be used to provide opportunities for minority to go to school.

Mr. THOMAS. Your responsibility, within the Department, is what, specifically? Civil rights enforcement?

Mr. WILLIAMS. In civil rights enforcement—there are four major Federal civil rights laws in the area of education protecting individuals from discrimination based on race, national origin, color, sex, handicap, and age. That's what we do.

Mr. THOMAS. So, as opposed to policy and determining the numbers and all that, your specific concern is adherence to the civil rights law.

Mr. WILLIAMS. We're a law enforcement office.

Mr. THOMAS. I have no further questions.

Mr. WEISS. Thank you very much, Mr. Thomas. Just one point on the questions that you raised: Mr. Williams, when the December 4 letter, announcement from your office, created an uproar, on December 18 there was a modification. And in that modification, the news release that was issued from your office says, "Under Title VI, however, private universities receiving Federal funds may not fund race-exclusive scholarships with their own funds." Now, that's a new interpretation of title VI, isn't it?

Mr. WILLIAMS. No, sir.

Mr. WEISS. OK. Mr. Payne, I think we'll call on you, at this point.

Mr. PAYNE. Thank you very much. Your position with the Department is, as you said, a civil rights enforcer. I'm just curious how the December 4 press release came about. You started reading title VI and felt there had to be some enforcement of civil rights? Is that your main job? Who's civil rights were you enforcing?

I'm glad that my colleague asked the question about your position. But when you clarified it, that you are the enforcer of civil rights, that even confused me somewhat more. So, maybe if you can lay that out, slowly, I'll understand.

Mr. WILLIAMS. Title VI starts off and it says, "No person shall be discriminated against," and in looking at what we learned was possible, from the Fiesta Bowl, that the Fiesta Bowl may, indeed, be creating or allowing or assisting University of Louisville and University of Alabama to establish race-specific scholarships. The concern was raised as follows: We have already discussed that States that have discriminated in the past can, indeed, use race-specific conduct; they can have race-specific scholarships.

Kentucky, Louisville, was one of those States, and they had, at the time of December 4, race-specific scholarships. But the law also says that the reason we allow people, institutions, to engage in race-specific affirmative action is because they've discriminated in the past. But once they are no longer deemed to be a discriminator, then they can no longer engage in that kind of conduct.

At the same time in late November, when we were looking at, or I was looking at the Fiesta Bowl, we were also making the determination, or at least reviewing and looking at making the determination as to whether the State of Kentucky should now be deemed to have complied with their higher education desegregation plan with the Office for Civil Rights.

So, the consideration became: If the decision is made that Kentucky has complied with the law and is no longer deemed to be a discriminator, they would no longer be in the position of being able to offer race-specific scholarships. So the question for me was: Do you get in front of the curve and say, "There may be other ways to do this," or do you allow Louisville to go ahead and create the race-specific scholarship, as the news accounts suggested that might, and then have the charge that, "Well, why didn't you tell us,

before we did this, that we may not be in a position to do it?" So I took the position to get in front of it.

If I could mention one other thing, and so you ask, "Well, who's civil rights would be violated?" If they are no longer a discriminator, then there are any host number of students on that campus that then, indeed, would be subject to the protections of title VI. They could be Hispanic students; they could be Asian American students; they could be Arab American students; they could be white students. All of those students, if the State of Kentucky had been deemed to no longer be a discriminator, all of those students would now be in a position to say that they deserve those—one other thing is that during the confirmation, my confirmation, I received a number of comments from your colleagues in the other body, that suggested that OCR needed to be more proactive. And so this was an attempt, as I've said before, to provide some kind of technical assistance. And the press release was an attempt to give notice to folks that that's what we were doing.

The last thinking that went into it was that we have not had a number of batters in this area in the past. But we do indeed have, at the time of December 4, six complaints in the office alleging that individuals in financial aid programs had been discriminated against, those individuals being nonblack individuals. And so, there are sort of a myriad number of factors that went into it.

Mr. WEISS. Would the gentleman yield just for one question?

Mr. PAYNE. Yes.

Mr. WEISS. Mr. Williams, you'd already agreed, in questions that I asked you earlier, that the title VI regulations say, for example, "Even in the absence of such prior discrimination, a recipient in an administering a program, may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of particular race, color, or national origin." So how can you take the position that because Kentucky had corrected its problems that it cannot utilize this provision of title VI?

Mr. WILLIAMS. Because when we go, Congressman, to the *Bakke* case. The *Bakke* case tells us a couple of things—

Mr. WEISS. The *Bakke* case has to do with admission.

Mr. WILLIAMS. And the principles apply, as well, to financial aid.

Mr. WEISS. Not according to the language of the *Bakke* case, if you read it. I'm sorry, Mr. Payne.

Mr. PAYNE. That's all right. As you said before, I probably should pose some of these questions, quoting you, to "people who got upset or got alarmed." They would be better suited to answer these questions, concerning the impact on minority students. So, it's very clear that, in your opinion, no damage was done or that the wrong signals, which, in my opinion, were sent, went out from your office.

Mr. WILLIAMS. I would agree with a part of it. There is no doubt in my mind that bad messages got to students and parents. I think we may have some disagreement as to who caused the bad signals.

But without any doubt—and I think that's the reason and that is a justifiable reason for Secretary Alexander saying that now he wants to conduct a review so that we can get to a policy of general applicability in some due course. But there's no difference between us that there were, indeed, some bad messages that were sent to students and their parents.

Mr. PAYNE. Remembering what the Senators said, that they really want to see a proactive OCR, the first thing you thought about was this? This was the way to get the civil rights division active?

Mr. WILLIAMS. No. As a matter of fact, what we did was, for the first time in the history of the Office for Civil Rights, develop what we call the national enforcement strategy, which outlines seven high priority issues that we wish to address this year. Those issues being: Limited English proficient students: Those thousands of students that come into this country each year, or are already here each year, that cannot speak English, and the need for schools to provide them with educational services.

The second issue being the question of ability grouping and tracking: The allegation that elementary schools and high schools are either inappropriately assigning minority students to either low track classes or to classes that do not challenge them appropriately.

A third issue being the questions of racial harassment and violence on our college campuses. Fourth being the question of the increasing number that we will probably see, in our schools, of students who are born with the addiction of their parents. Another issue being the question of providing educational services for pregnant teens.

One that was indeed suggested, strongly, by Members of the Senate, was trying to get a handle on providing and protecting the civil rights of homeless students, homeless students with handicaps.

And so that was what was the initial effort of the Office for Civil Rights, but again, we have a confluence of events. I think many of the people to my left—on December 11, I announced the national enforcement strategy to my staff. On December 12, we intended to announce it to the world at a press conference that many of the people to my left were at.

It just so happened that December 12 was also the day that an article appeared on the front page of the New York Times regarding this issue. And so most of, if not the great, great, great majority of the questions were directed not about the national enforcement strategy, but about the question of minority scholarships. It also happened to have been the day of the resignation of former Secretary Cavazos.

Mr. PAYNE. OK. I'll just ask one quick question to get back to the point. You're looking at the future and, after all of these minority students and every university has complied and are ahead, you're concerned about the future when other students might say, "Well that applies to me." The terminology you used is "deemed to have complied with the law." Now, you used the case of Kentucky, and you said Kentucky had complied with the law.

Mr. WILLIAMS. Not had, we were making the determination of whether they had.

Mr. PAYNE. OK.

Mr. WILLIAMS. At the same time.

Mr. PAYNE. What was your determination, since you made the statement?

Mr. WILLIAMS. We have not completed that, as a result of—

Mr. PAYNE. But that was one of your worries in the case. This might be out of step, but why didn't you wait until you had at least finished studying Kentucky before you announced this new initiative?

Mr. WILLIAMS. Again, the reason being is because University of Louisville is a State school in the State of Kentucky.

Mr. PAYNE. Right.

Mr. WILLIAMS. And the concern was if Louisville goes ahead and establishes a new set, or new group, of minority-limited scholarships and then, in a short time after that, we determine that the State of Kentucky has now complied with the law, then I think I am open the question, "Why did you let us go ahead and do that, if you were going to stop us from doing it anyway? Why didn't you just tell us in the beginning?"

Mr. PAYNE. A lot of money could have been used for that other purpose. In other words, it seemed like you were more anxious to get this policy out. But the other part of my question is how a person complies with what you think is compliance—is there no consideration for 300 years, or 200 years, or 100 years, or 50 years of past discrimination? When do you catch up?

If you're in a race, and it's a 100-yard dash, and you start at the starting line, and somebody's at the 50-yard line, you're never going to win. So are you concerned that the University of Louisville has an overpreponderance of minorities getting scholarships?

I mean, if you went there, would you see four or five minorities to every two or three of all the other people that are on scholarships? In other words, you seem to be taking a needle in a haystack and coming up with a major determination on your fear that the day is going to come when we have overcompensated.

In 1976, 6.4 percent of minority students graduated with a bachelor's, in 1989, it fell to 5.7, and I'm not even getting into doctorate or master's degrees, but you are coming up ahead of the wave. I just don't know what you've been reading, or how you could come up with such a drastic decision just almost shooting from the hip.

Your decision has got colleges in New Jersey, private institutions, who have stopped. They say they don't know what to do, and therefore, they're not going to violate a law. More damage has been done by your statement. Then 2 weeks later, you've made it stronger. You've made it positively no funds. I don't even understand that. After all the uproar, you came back in to make sure, that the final nail was in the coffin.

How can you explain the December 18 statement that it says, "Where such scholarships are funded entirely by private persons, or entities, that have restricted the funds to this purpose, an institution may administer such scholarships." You went on, really, to say that superseding title VI implementing regulations, absolutely prohibits private colleges and universities from administering minority targeted scholarships from their own funds, no exceptions provided. That even goes a few steps further, after the uproar. Did the uproar steam you up, fuel you up, to make sure it's really clear?

Mr. WILLIAMS. Let me see if I can go back with the first statement about the recognition of many years of discrimination. Not only do I recognize that there is a responsibility for past discrimi-

nation remedied, the law does as well. And that is in the Fiesta Bowl letter. It says that, "A recipient may adopt to participate in race-exclusive financial aid programs when mandated to do so by a court, or administrative order, court action plan, or settlement agreement." When it is a proven discriminator, they can, indeed, engage in race-specific conduct.

The second part, with regards to institutions in your State or in States around the country that are asking the question, "What do we do now?" I think, the Secretary said today, fairly clearly, that what you do now is to go about the business of trying your best to get students into your school, and go about the business until the Department says anything to the contrary.

And so if there needs to be another message sent, then the message is—

Mr. PAYNE. Don't say anything more, though, let somebody else say it.

Mr. WILLIAMS. No, if there is a message, the message should be to go about the business of trying to encourage and bring students onto that campus.

Mr. PAYNE. Alright, Mr. Chairman.

Mr. WEISS. Thank you, Mr. Payne. Mr. Hobson? I'm pleased to, in fact, recognize Mr. Hobson, who is a distinguished new member from the State of Ohio.

Mr. HOBSON. I have three things, and then I'd like to make a statement at the end. Do you want to explain the *Bakke* case?

Mr. WILLIAMS. *Bakke* sets out a number of principles. The first one being that, in order to engage in race-specific conduct, there must be proven instances of discrimination against that race by that particular institution. The second principle that I read in *Bakke*, is that the question of societal discrimination, not discriminating against somebody at a specific institution, but the societal discriminating against one or more race or ethnic groups in the past, is not a basis for engaging in race-specific remedial conduct.

A third issue is the one which we, at OCR, have in the past recognized in the second affirmative action provision in the regulation. And is the question that even if you haven't been discriminating in the past, even absence of discrimination—and we recognize that what you want on a college campus is something called diversity.

But diversity on a college campus is, as I read *Bakke*, is something a little bit more than racial diversity. It means you want income diversity, you want a rich kid, you want a poor kid, you want one from the Midwest, you want one from the South, you want a black kid, you want a white kid, you want a guy who worked all summers, you want a guy who's never had to work a day in his life, because you want a lot of different kinds of people.

And because you want, as the Court said, as Justice Powell said, in *Bakke*, what you want is a robust exchange of ideas; and you get that by having a lot of different kinds of people, but not just race diversity. And so what is in the December 4 letter, as part of the analysis of *Bakke*, is that you can use race as a factor, among other factors, to make a determination about who to provide financial assistance to.

Mr. HOBSON. Let me tell you what I think is a problem. I happen to sit on the board of an historically black school. Most of our students come from families of \$15,000 or less, economically. There are first-time students in that institution, the first family member to go to a school. And, I think, probably, you look through the law and maybe, technically, correctly, on the law, you were right. I don't know. I don't practice law anymore; never did really. Maybe I just know enough law to be dangerous.

But the message that came out, and what comes out to a lot of people, is that there's an insensitivity to the problems that a lot of people face in society in gaining access to education and to opportunity. And that many of us have tried, for a long time, in our own ways, to gain that access and to assist people in the—while technically, legally, I don't want to get into that argument, because I'm not qualified to get into that. You may have taken the right position, I don't know.

But to the body politic, in many instances, or certainly, to those people who were looking for ways to assist people, it appeared to have a negative—and it does, I think—or a chilling effect on a lot of things that they might try to do, or want to do, even though it may be technically—and I don't know how, maybe this is that other thing I want to know—but do you understand, in retrospect what resulted in a lot of people's thinking about the policy of your Department, of the administration, as to the result of what happened? Or was there any contemplation of that, before it came out? Or maybe you didn't have a chance to get it out before that happened, but was there any understanding of that?

Mr. WILLIAMS. Obviously, I share the concern about the message that was sent, and also share the concern about the impression that, in some kind of way, either we, or I, or the administration, lack the appropriate level of compassion about folks who may be disadvantaged. If the question is, quite frankly, how much of that went into play in the December 4 letter, I have to tell you that I look at, quite frankly—and many people will disagree—but I look at OCR as an enforcement office. And I feel uncomfortable with looking at those wide range of other kinds of issues that's for, quite frankly, for the balance of the Department, for many other people in the Department to look at those issues along with us.

I have to tell you that there would be a whole lot more thinking about that, in the future. But it's an enforcement office, and I think we have to be careful when you have enforcement official licking their fingers and sticking them up in the wind and trying to figure out which way the wind's blowing.

Mr. HOBSON. It's not a question of necessarily wind, I think it's a question of sensitivity and compassion for some other people, and somebody along the line has got to say, "Hey, this may be technically correct here, but is it the right thing to do for all people?" And I think somebody along the line had to say, "Hey, wait a minute, are we sending the right signals when we do this?" And, apparently, that didn't happen, or if it did, it wasn't listened to someplace, along the line.

But I can also tell you that there are a lot of people out there that don't care how they get that scholarship, whether it's race specific, or not, if that's the way they're going to get into the

system and the way they're going to be able to advance. Because when you come from a family that's \$15,000, or less, of income and you're the first person to ever go to school, you're looking at whatever you can do to get into that environment and to try to stay in that environment.

And one of the problems, if you look at the number of medical students today, it has dramatically dropped in the minority population. And we tried, when I was on the board of another school, Central State, to get kids so they could get into medical school, and we did, and that program has since been dropped, unfortunately.

I want to go back to another technical question, then I'll stop my philosophizing, but I think philosophy plays a role that maybe wasn't sensitive enough in this situation. From a technical standpoint, how does a State become a nondiscriminator, or how does it cure itself from those past activities that have contributed to this. I find that interesting, because I don't where my State complies, and I'm not sure we do enough in my State; I'm sure we don't, from what I've seen. But how do you form a criteria for that?

Mr. WILLIAMS. We start with 17 States that had dual systems. They had, at one time, a school that only white students would go to, and they had another school that only black students would go to. And since I've used my State of Texas quite often, in the past, we had Texas Southern and Prayerview A & M, and so we had a dual system in Texas.

And what has happened is that those States entered, either by court order, were told that there were certain things that you must do, a checklist. You either build facilities at the black school, or you engage in certain kinds upgrade of departments, at one school or the other, to attract students of different races. But either by court order, or by an agreement with the Office for Civil Rights, depending upon how you were determined to have been a past discriminator, there are things that you had to do.

After having done them, if it's a court ordered plan, a Federal judge makes the determination that you've complied with his court order. It is a plan with the Office for Civil Rights, then the Office for Civil Rights determines whether you have complied with the agreement that you have with the Office for Civil Rights, and that's how one, in a nutshell fashion, becomes released and becomes deemed to be a nondiscriminator.

Mr. HOBSON. How often has this occurred? Texas is out, or—

Mr. WILLIAMS. Texas is under review, at the current time, I think. As the chairman mentioned, there were 17 States, and I think 10 were released prior to 1989.

Mr. HOBSON. I guess there are a lot of us out there that are involved in schools, that will take the money any way we can find the money for those kids, and then you can sue us later, if you want, but we'll get some kids through. And I just hope that, as a result of this, there is more sensitivity to this issue. I think one of the things that is needed is not only compassion, but sensitivity to words and to actions and how they appear, beyond the legal side, to people in society as they function and try to achieve good status.

If I look at your background, you've got a wonderful background. I just want to see more people be able to do the same things that you've done.

Mr. WILLIAMS. The objective of Secretary Alexander, the review, is to, indeed, do those kinds of things. I mean, to do a deliberate review and to do it in a way that no matter where we go, we keep our eye on the ball. And the ball is that, within the constraints of the law, to try to find the ways to provide as much opportunity for folks as possible.

If I could go back to your comment about the HBCU's, it is very unlikely that what was in the December 4 letter would have affected your students, in light of the fact that I doubt that an HBCU has race-designated scholarships; it would not have to. Just because the majority of the students may be black, would not mean that those are race-specific scholarships, scholarships could be any kind.

Mr. HOBSON. It's just the chilling fact that—

Mr. WILLIAMS. I recognize that.

Mr. WEISS. Thank you very much, Mr. Hobson. Mr. Williams, I'd asked you earlier if Mr. Richard Komer was here, and I asked you to attempt to get him here before we had to use other process. Is Mr. Komer here?

Mr. WILLIAMS. He is not in the room, sir.

Mr. WEISS. Well, then, at this point we will undertake some administrative business. On February 28, I requested that the Assistant Secretary for Civil Rights and his Deputy Assistant Secretary for Policy appear before the subcommittee, to testify about the minority scholarship policy.

Richard Komer, the Deputy Assistant Secretary, apparently refuses to testify. We still have not heard the testimony of the key individuals who formulated the minority scholarship policy. The Department has forced my hand, I have no choice but to seek a subpoena for the testimony of Richard Komer, Deputy Assistant Secretary for Civil Rights, before proceeding. Is there any discussion?

Mr. THOMAS. Mr. Chairman, I'm reserving the right to object. This is sort of a new experience to me, but it's my understanding that the normal process is that subpoenas are issued in the case of some kind of illegal process, and not in the matter of policy. This is a question of policy, and I would ask you what the precedence is and what the position is, with regard to subpoenas on policy.

Mr. WEISS. The precedent is that Federal employees are invited by committees of Congress to appear before them. If they do not respond to the invitation then, regardless of what the matter is, whether it is policy, whether it is illegalities, whatever, then the committees, or Congress itself, have the power to issue subpoenas. And that's the way that the subcommittee, and the committee itself, has operated, over the years. Any further discussion?

Mr. PAYNE. No, Mr. Chairman, other than that we've been through this before, and it's not a new policy. I think, last year, we met on subpoenas before, as was the policy of the committee.

Mr. WEISS. I move that the subcommittee, then, if there is no further discussion, authorize the issuance of a subpoena to require the appearance of the Deputy Assistant Secretary for Policy. Is there a second?

Mr. PAYNE. I second the motion.

Mr. WEISS. OK.

Mr. THOMAS. Mr. Chairman, may I inquire again about the process? Do we have the proper number here for a quorum?

Mr. WEISS. A quorum is present.

Mr. THOMAS. Well, Mr. Horton does not support this idea, and I don't intend to support it either.

Mr. WEISS. Right. I have the highest regard for you and for Mr. Horton. The vote now occurs on the subpoena, the clerk will call the roll.

Ms. ATKINS. Mr. Weiss.

Mr. WEISS. Yes.

Ms. ATKINS. Mr. Waxman.

Mr. WEISS. Aye by proxy.

Ms. ATKINS. Mr. Payne.

Mr. PAYNE. Aye.

Ms. ATKINS. Mrs. Mink.

Mrs. MINK. Aye.

Ms. ATKINS. Ms. DeLauro.

Mr. WEISS. Aye by proxy.

Ms. ATKINS. Mr. Thomas.

Mr. THOMAS. No.

Ms. ATKINS. Mr. Zeliff.

Staff COUNSEL. No by proxy.

Ms. ATKINS. Mr. Hobson.

Ms. ATKINS. Mr. Sanders.

Mr. SANDERS. Aye.

Ms. ATKINS. Six aye, two nay.

Mr. WEISS. And the subpoena has been voted by the subcommittee. We will now return to questions. Let me just touch on a couple of items that—

Mrs. MINK. Mr. Chair, may I just make a brief statement?

Mr. WEISS. Of course, Mrs. Mink.

Mrs. MINK. I cannot apologize more grievously on not being able to participate in this very, very important hearing you've scheduled, an issue which I care very deeply about. And I would be here except that we are on a mark-up state in Education and Labor on the family and medical leave bill, so I must excuse myself, again, to go back to deal with the amendments.

Mr. WEISS. I fully understand and if you'd like to make some opening comment while you're—

Mrs. MINK. If I might have permission to have leave to insert my remarks, at this point, in the—

Mr. WEISS. Absolutely so. Without objection, that will be—

Mrs. MINK. Thank you very much.

Mr. WEISS. Mr. Sanders, would you like to make an opening comment?

Mr. SANDERS. Not at this time.

Mr. WEISS. Thank you. First, as to the *Bakke* decision, and without going into it, at great length, what we're talking about here, what your statements and letters and initiatives and policies of December 1990 involved were scholarships to students who had already been admitted into colleges and universities. What *Bakke* was dealing with was the admission of a student into a institution of higher education on the basis of race.

And the Department of Education issued, in the Federal Register of October 10, 1979, a policy interpretation, coming from the Office for Civil Rights and its summary of policy interpretation, it said, briefly, "The Department has reviewed the Supreme Court's decision on *Bakke*. It has determined that voluntary affirmative action may include, but is not limited to, the following: Consideration of race, color, or national origin, among the factors evaluated in selecting students; increased recruitment in minority institutions and community; use of alternative admissions criteria when traditional criteria are found to be inadequately predictive of minority students' success; provision of pre-admission compensatory and tutorial programs; and the establishment and pursuit of numerical goals to achieve the racial and ethnic composition of the student body the institution seeks."

I can hardly see how, at this stage, you can argue that *Bakke* forces you to adopt the position that you did.

Mr. WILLIAMS. If I could respond, Mr. Chairman. Since that time, going back to May 2, 1986, in a letter from then Acting Assistant Secretary Alicia Corro, in a document that I think has been provided to your staff, with regards to a scholarship that was being created for Dutch-Americans, it does, indeed say, on the second page in the next to the last paragraph, that, "Any determination, with respect to the legality of the scholarship program mentioned in your letter, would take into consideration the title VI regulation, the *Bakke* case, and other relevant case law."

Following that, in 1986, in a similar advisory to the Southwest Missouri State University, on page 3, in the first full paragraph, it has the same language, with regards to the applicability of *Bakke* to the area of financial aid. We have indeed, sir, applied *Bakke* to financial assistance prior to my December 4 letter.

Mr. WEISS. You're telling us then that the policy interpretation, printed in the Federal Register of October 10, 1979, has been rescinded by advisory letters to universities or colleges or recipients?

Mr. WILLIAMS. I'm saying that they have been the regulation, the second item, section 100(b)(6)(ii), that states that a recipient may use affirmative action, has been read and interpreted in a way that applies *Bakke*.

Mr. WEISS. In the face of the Federal Register interpretation. OK. Let me go to another point. You continued to say that, in fact, your statements during December were not policy changes. The December 18 clarification, issued from your office, is headlined "Department Issues Policy Statement on Race-exclusive Scholarships."

First paragraph: "The U.S. Department of Education, today, announced a six point administrative policy regarding race-exclusive scholarships to prevent disruption to the efforts of colleges," et cetera. In the face of that, I don't know how you can continue to say that what you announced was not a policy change or policy determination.

Mr. WILLIAMS. I think it is probably fair to say that what I said was, what I announced, on December 4, was not a change in policy. There are, indeed, policy announcements on December 18 that I, on behalf of the Department of Education, announced.

Mr. WEISS. Oh, so the December 18 statement was a policy change.

Mr. WILLIAMS. There is a policy interpretation difference on December 18.

Mr. WEISS. OK. Now, did those policy changes go through all the requirements of the Administrative Act?

Mr. WILLIAMS. They did not.

Mr. WEISS. No, sir. And not printed in the Federal Register?

Mr. WILLIAMS. They were not.

Mr. WEISS. No public comment?

Mr. WILLIAMS. There was none, other than the free-for-all before, but no, there was not.

Mr. WEISS. Were you the Assistant Secretary for Civil Rights on May 1, 1990?

Mr. WILLIAMS. No, I was not.

Mr. WEISS. On May 1, 1990, Richard D. Komer, of the OCR central office sent a memorandum to the civil rights director in region 4, suggesting that Florida Atlantic University be investigated as part of a compliance review. Mr. Komer is not here, yet, to testify about that, and I don't really want your second-hand testimony about it. We'll get it from Mr. Komer.

You are aware of the fact that the new policy change, whether of December 4 or 11th or 18th, was, in fact, under discussion before you arrived as the new Assistant Secretary for the Office for Civil Rights?

Mr. WILLIAMS. We will continue to have the discussion about whether it was a change or not. I am aware—

Mr. WEISS. Well, you said that, as far as the 18th is concerned—

Mr. WILLIAMS. The 18th, the policy changed with that provision that dealt with the use of privately designated funds, and that would be the policy change.

Mr. WEISS. Right. OK.

Mr. WILLIAMS. The balance of that, I would still contend, would not have been a policy change. I am aware that the Office for Civil Rights was, indeed, developing a policy guidance document, prior to my arrival.

Mr. WEISS. So that, in essence, you found this initiative underway and, in essence, in motion toward action by the time you arrived; that you didn't conceive this—

Mr. WILLIAMS. There was activity, yes.

Mr. WEISS. You didn't conceive this initiative by yourself.

Mr. WILLIAMS. I did not conceive the development of the policy guidance document; that's correct.

Mr. WEISS. Did you adopt the policy because of Mr. Komer's representations to you?

Mr. WILLIAMS. No. I have gone through the law and had read it myself while Dick was at the Department, before I was—I have to say that I share in what's in December 4; it's over my hand, and that's me.

Mr. WEISS. Did Mr. Komer draft the December 4 letter?

Mr. WILLIAMS. No. The December 4 letter was drafted by a number of people. It was drafted, as most things in OCR, at the staff level, and then it goes through the process. It had my comments and changes through it. As the folks at OCR know, I use a red pen, and I mark up most things.

Mr. WEISS. Who first brought the Fiesta Bowl situation to your attention as a matter which you would want to pursue.

Mr. WILLIAMS. A staff attorney, in the Office of Postsecondary Education, brought it directly to me, and then, I called Dick.

Mr. WEISS. What did you say to Dick, Dick being Mr. Komer, yes?

Mr. WILLIAMS. Yes. A staff attorney brought it to me, having just read an article in one of the sports pages in somebody's newspaper, and said that there may be something that would be of concern. I said, "Look into it," and told Dick that the staff attorney was going to look into it and keep his eye on it.

Mr. WEISS. That these folks are going to provide some minority scholarships; we ought to go after them?

Mr. WILLIAMS. That's not the way the conversation went. The conversation was that, as I have explained before, in light of our situation with the State of Kentucky, and how it may impact upon that situation and that review.

Mr. WEISS. Were the schools involved in the Fiesta Bowl from States that had been found to discriminate in the past?

Mr. WILLIAMS. Both. As I mentioned to Mr. Payne earlier, yes.

Mr. WEISS. But isn't it true that even in cases where past discrimination has not been found, the *Bakke* guidelines encourage colleges and universities to take voluntary affirmative action?

Mr. WILLIAMS. They encourage them to do so in a specific kind of way, and that would be use race as a variable among other variables, but not in a race-specific way. You cannot earmark scholarships off to the side, and say, "These scholarships are for one minority group or the other." And what you must do is to say that every student on that campus, irrespective of race or color, competes for that scholarship, and race is one factor that you can give a plus factor to, among other factors.

Mr. WEISS. Is the Department of Education investigating any minority scholarship programs, in addition to the Fiesta Bowl?

Mr. WILLIAMS. Yes. And at this point, the Department has received complaints, I think, as I mentioned earlier, on December 4 we had six complaints. We are investigating those complaints. We will not be issuing any letters of finding on any of those complaints until after the review is being conducted currently.

Mr. WEISS. In a memorandum about your investigation about the Oregon State Board of Higher Education, Mr. Komer writes that the Office for Civil Rights will rely on *Bakke* in determining the validity of affirmative action programs. But then, Mr. Komer goes on to criticize the State of Oregon's goal to "increase the enrollment of blacks, Hispanics, and Native Americans." How is that goal inconsistent with the Office for Civil Rights own public guidance on affirmative action?

Mr. WILLIAMS. I am not in a position to answer that, Congressman.

Mr. WEISS. In a draft report, you claim that the State of Oregon is in violation of civil rights law because its tuition grant program to attract minorities excludes certain races and ethnic groups. Can you tell me what you found the purpose of the Oregon minority recruitment plan to be?

Mr. WILLIAMS. Congressman, that is a pending investigation, and it would be inappropriate for me to discuss many of those matter at this time, I would think.

Mr. WEISS. Well, the Department's letter of finding is a matter of public record, at this point, isn't it? It's a draft?

Mr. WILLIAMS. The draft letter has not, and I think our agreement—and I may be wrong, and staff may be in a position to provide that information to me—is that that information would not be released to the public; it is for the purposes of this committee in your internal deliberation.

Mr. WEISS. I'm asking you questions, at this point. I won't pursue that question, but I think that the earlier question that I asked makes a point. How does the percentage of white high school graduates entering college in Oregon compare to the percentage of black, Hispanic, and Native American high school graduates attending college, in the State?

Mr. WILLIAMS. I don't know, but I would suspect it's higher.

Mr. WEISS. Well, 16 percent of whites go to college, while less than 9 percent of blacks, Hispanics, and Native Americans go on to college. Twice as many whites go to college, in Oregon, as minority students, and you found the State was trying to correct this imbalance; is that right?

Mr. WILLIAMS. That's what they were attempting to do.

Mr. WEISS. In this case, did you also find that title VI "provides that in even the absence of prior discrimination, a recipient may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin?"

Mr. WILLIAMS. That is in the regulation. They may do that. It's a question of how you do it, and I will refer, again, to *Bakke* that says that you can give race a plus factor.

Its probably also helpful, in this discussion, to look at, as we are discussing it, that the complainant, in that case, as we talk about minorities, the complainant, in that case, is an Asian American female that has alleged that the tuition waiver program of the State of Oregon deprives her of an opportunity to go to college, because she is not entitled to that tuition waiver, because the tuition waiver is only for blacks, Hispanics, and Native Americans.

Mr. WEISS. Right. She found the Oregon program to be illegal because it excludes whites and Asian Americans; is that correct?

Mr. WILLIAMS. The complainant is Asian American.

Mr. WEISS. Did your report find that 95 percent of the students in Oregon colleges are white or Asian Americans?

Mr. WILLIAMS. That is a draft report, and if that is in the report, then that would be—

Mr. WEISS. How many white or Asian students who are academically qualified for Oregon colleges and assorted missions were denied entrance to school because of the State's recruitment program?

Mr. WILLIAMS. I have no personal knowledge of that.

Mr. WEISS. Our information is that the answer is zero. But how can you reach a conclusion about a case without knowing whether, in fact, students were denied entrance or how many were denied entrance?

Mr. WILLIAMS. Because the question that is presented is: Is the financial aid constructed in a way that violates title VI? And when there is an Asian American female that says that she has been denied an opportunity for the tuition waiver, which means she can't—the tuition waiver allows you to go to school for absolutely free—because she is not one of the minority groups that is preferred in this particular program.

Mr. WEISS. I gather that your finding in the Oregon case is not final.

Mr. WILLIAMS. That's correct; it is not final.

Mr. WEISS. In conducting its investigations and compliance reviews of colleges and universities, the Office for Civil Rights often compares the numbers and percentages of white students with minority students. Why is that done?

Mr. WILLIAMS. White students and minority students at the university?

Mr. WEISS. At universities, generally.

Mr. WILLIAMS. To get some idea, simply, of what's going on at the university and what the representation is at the university.

Mr. WEISS. To determine if there is a statistical evidence of discrimination, right?

Mr. WILLIAMS. No, to determine whether there may be conditions that limit participation. That's the reason for looking at it.

Mr. WEISS. Do the Department statistics show that black students have overcome the effects of discrimination?

Mr. WILLIAMS. The Office for Civil Rights doesn't engage in widespread studies of that nature to determine that.

Mr. WEISS. Well, you certainly did in regard to the 10 States which had court mandated requirements because of vestiges of discrimination.

Mr. WILLIAMS. Mr. Chairman, in looking at and in making that determination, not having been at OCR, at the time, what OCR, as my understanding, did was to look at did that State comply with the agreement that they had with OCR, not did they actually increase the numbers of minorities in their higher education system. Did they build a chemistry department at a particular college? Did they enhance the chemistry departments somewhere else? Those are the things that they were asked to do.

One other thing, as we are on that subject, we will probably be getting more guidance, quite frankly, on how to make those determinations as there is an application for certiorari on the Supreme Court now.

Mr. WEISS. In the report published in January 1991, by the Department of Education, called "Race Ethnicity Trends and Degrees Conferred by Institutions of Higher Education, 1978-1988," contained the following: The number of undergraduate degrees awarded to blacks fell from 60,125 to 58,016; the percentage of the total, from 6.6 percent to 5.7 percent. The number of black master's degrees fell from 19,993 to 14,076; the percentage of the total, from 6.6 percent to 4.6 percent. The number of doctoral degrees fell from 1,267 to 1,071; the percentage from 3.9 percent to 3 percent. That your department does maintain those statistics.

The Department of Education has chosen to allow the lapsing of desegregation plans for systems of higher education in 10 southern

and border States that had practiced illegal segregation in the past. Did the Department find that the desegregation plans eliminated the vestiges of past discrimination?

Mr. WILLIAMS. I have no knowledge of what the past determinations found. I was not at the Department at the time.

Mr. WEISS. Well, an internal memorandum, reviewed by the subcommittee at its last hearing on OCR, stated that the States "have not heretofore even approximated what might be considered the elimination of the vestiges of dual systems."

The subcommittee's review also found that the statistics in most of the States worsened over the course of the desegregation plans, and that the plans were failures. Also, the statistics indicate that, in most cases, the records of State schools worsened, over the course of the plans. Would you argue with that?

Mr. WILLIAMS. I have no personal knowledge, either way, of that, Mr. Chairman.

Mr. WEISS. Thank you. Mr. Thomas.

Mr. THOMAS. I have no further questions for this witness. It seems to me, we've sort of gone beyond the question, here. This decision has not been changed. We're looking forward, now, to a process, and that's the one I think we ought to focus on. I have no further questions.

Mr. WEISS. Thank you, Mr. Thomas. Mr. Payne.

Mr. PAYNE. Earlier, you indicated that there were some other programs, similar to the Fiesta Bowl scholarship program, that you're investigating.

Mr. WILLIAMS. Yes.

Mr. PAYNE. What are those?

Mr. WILLIAMS. We have, at this current time, seven pending complaints. We have the Oregon matter; we have a matter involving the State of Ohio that has a loan program that makes distinctions. I think what the allegation is, is that students have to major in a particular subject in order to keep the loan. We have a complaint in the State of Wisconsin, filed by an Asian American student saying that they—it's a scholarship for minority students, but Asians are not included.

There is a complaint at a school in Indiana. The allegation is that in the scholarship for minority students, Asians are, indeed, one of the kinds of minority students that are a part of it, but the scholarship doesn't provide for Indian American students.

There are two complaints in the State of Florida, one at Florida Atlantic University and one at the University of Florida, where the race-specific scholarships are designated solely for black students. The other two, quite frankly, I have forgotten, and I would have to provide those to you at some time.

Mr. PAYNE. So your push is, more or less, to protect other minorities. You mentioned in your discussion that your major concern now, is that Asian students are being shut out; they're usually disadvantaged; they're usually those that need extra help to get in. And therefore, your Department's major thrust is to protect Asian students because of the—

Mr. WILLIAMS. Congressman, our major thrust is to protect the federally protected rights of students, irrespective of whatever race they may be. Title VI says, as I had mentioned before, starts off

with, "No person shall be discriminated against." Plus, to directly respond to your question about the focus on Asian students, in our appropriation for this year, there is a special earmarking that tells us that we must spend at least \$250,000 to address the reviews of discrimination against Asians in the admissions process.

Those are complaints; we did not go seeking those six, or so, matters that I mentioned to you. Those are things that are brought to us. But is there a greater focus on Asians, as opposed to Arab Americans, as opposed to Hispanic Americans, as opposed to black Americans? The answer would be no. Our responsibility is to protect the federally protected right of all students.

Mr. PAYNE. All right. But in the discussion earlier, when Chairman Weiss was talking, you kept referring to *Bakke* and admissions, and we're talking about financial scholarships. That's what I'm primarily concerned about.

And if you take the number, probably, of Asians who need either financial aid or are not getting scholarships based on ability, you find very few excluded. If you take the same criteria for other minorities, like blacks, who have continually been behind, you find a grave disproportion and a declining number of students getting degrees.

So, I'm confused as to why the Department, at a time when we find that African Americans are joining the armed services because they lack the ability to go to college, because they lack financial ability, they go into the military to get benefits. In my city of Newark, NJ there are very few jobs because of the declining number of persons in higher education and we find the tremendous negative health statistics in our community, infant mortality going up and so forth. And of all the things that the Department of Education decides to do is to have a frontal assault against scholarships based to minorities.

Let me just ask you a question. When did you start with the Department?

Mr. WILLIAMS. July 6, 1990.

Mr. PAYNE. Where were you prior to that?

Mr. WILLIAMS. Department of Treasury.

Mr. PAYNE. You know, they really need good people in the Department of Justice to really go out aggressively. I wish you were over there.

Mr. WILLIAMS. I have been.

Mr. PAYNE. OK, well it would be good to reapply there because—I'm baffled as to why the Department of Education would, at this point, take on this issue with such fervor and zeal.

Mr. WILLIAMS. Congressman, it obviously does appear that there is a great deal of zeal. There was, as I will say again, this was a letter that offered assistance to the Fiesta Bowl on how to go about the business of designing a scholarship that would, indeed, advance financial aid opportunity for minority students. It was not an effort to say, "Let's go and find out who's got a scholarship for minority students, and let's see if we can stop it." That wasn't the design of it; that wasn't the intent.

Mr. PAYNE. Well, what was the result?

Mr. WILLIAMS. The result may, indeed, have been that.

Mr. PAYNE. They always say that the proof of the pudding is in eating; the result is the bottom line. You could have a company that is the greatest company in the world and is bankrupt at the end of the year. So the result of that letter, as I indicated, even in my State where private institutions are currently saying that, "We wish we could continue, but we are unclear about the law in light of a declining minority participation in higher education," is negative.

How is this Nation ever going to move forward if the Department of Education's Civil Rights Division is going to make it tough for the colleges and higher learning institutions that might attempt to do the right thing, or private institutions, like the Fiesta Bowl who decided they wanted to help disadvantaged minority, black students? I'm trying to understand the intent.

Mr. WILLIAMS. The intent was to provide the assistance, as I suggested.

Mr. PAYNE. But they were doing all right. What kind of assistance did you offer, other than have them not do it?

Mr. WILLIAMS. We have indeed, been in contact with the people, and talked to those individuals. But the other thing is the question about whether there was a frontal assault. There was not a frontal assault. And whether the proof is in the pudding, we have no control over how other folks read it.

There were a number of mistakes that were made. Obviously, there were mistakes in the way we communicated. Mr. Hobson talked about in the manner of messages, and there were, obviously, mistakes made in that. But the letter itself offered technical assistance. If we ask where was the problem, or if it ain't broke don't fix it, we know that, at least in six instances, somebody thinks that the system is broke. And we have a responsibility to protect those federally protected rights of all students that are out there, each and every one of those.

Mr. PAYNE. We're aware of that, and we want every student to be protected. I want every Asian and Native American, or other group to be protected. I'm not saying that I think anyone should be discriminated against. It's just that after you put out that letter, and then you said, "Well, you know, they just read it wrong," and say, "Come to see us and we'll give you some technical assistance." That's like going to someone who just robbed you and asking them to show you the way home. How comfortable would institutions be?

You're releasing this statement that gets worldwide acclaim, and turning around and saying, "But we're here to help you. We're going to give you some technical assistance." I'm so disturbed at the declining statistics as related to African Americans, in this country. Then, when you find a group wanting to enhance things that are on the decline—because we make America better when all people are performing, the Department of Education blocks that action.

And so, what kind of signal does this send? That's the thing that's more disturbing, the signal that it sends to higher education. Everyone's in favor of higher education. Mrs. Bush met Dr. Sullivan because she sat on the board of Morehouse, and he's the Secretary of Health. I don't know anyone who really feels that we need to take a frontal attack on higher education.

And that's, actually, the interpretation of what your December activities have done. It has, actually, slowed down and stopped some activity where people say, "I don't really want to get involved anymore." You don't even need to respond to that. I don't have any more questions, Mr. Chairman.

Mr. WEISS. Thank you very much, Mr. Payne. Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman. Let me pick up some of the points that Congressman Payne was raising and tell you what my major concern is about the situation.

It is no secret that in this country, today, we have a major crisis in terms of the affordability of higher education, not just for blacks, or whites, or Asians. The cost of college education is zooming off of the wall. I'm a U.S. Congressman, and I can tell you my wife and I have had to borrow money to send our kids to college.

What disturbs me is that what I see happening, in terms of these actions and this discussion, is that they happen instead of focusing on the crisis of the affordability of higher education, to ask why it is that there are fewer black students in college today, why working class white kids can't afford to go to college. That's what we should be investigating.

What does it mean to millions of families, in this country, that they can't send their kids, black, white, Asian, to college; that's the issue. And my concern, Mr. Chairman, is that out of the actions of the administration in this area, what you're going to have—and I don't think it's by accident, I have to say, in all due respect, I don't think you developed this overall policy—but there is going to be a type of conflict between white working-class families and black families.

So instead of having the debate as to how we can all send our kids to college, you're going to have white families say, "Gee, it's not fair, this black family is getting the money, we're not." And you're going to be talking about dividing people who should be coming together.

So, my major concern is that I do not want to see a process by which working-class people, white, black, or anybody else, are divided in fighting for a smaller and smaller part of the educational pie. I want to see the administration come forward and say, "We're providing more money. Every kid in this country has a right to go to college. We're deeply concerned about what's happening in the black communities. Let's all work together."

But I fear that these types of actions divide our people, rather than bring them together, and not let us focus on the most important issue. My question is: Don't you agree? [Laughter.]

Mr. WILLIAMS. I would obviously agree that there is a great deal of effort and work that's available for all of us, in terms of trying to provide opportunities. And I hope that through the review process, while the review process will not be, necessarily, addressing new funds, hopefully we can figure out a way that we can identify how do you provide scholarships and financial assistance to all students in a way that is not divisive. That is a concern that we share.

I have to admit that I'm not in the loop as it relates to new moneys, but I am in the loop as it relates to how we might be able to address this issue in a way that may not be divisive. And in that

sense, I, obviously, share that with you. I share some of the other concerns as well.

Mr. SANDERS. Thank you.

Mr. WEISS. Thank you, Mr. Sanders. I have a few more questions. In the area where I really would have preferred Mr. Komer to testify—and I still hope that he will do so, personally. And I should tell you, incidentally, there is a second panel, as you know, and if he comes to us before the hearing is concluded, he can avert the issuing of the subpoena; that's up to him.

But, let me ask you if you're aware that on May 1, 1990, Mr. Richard D. Komer, of the OCR central office, sent a memorandum to the civil rights director in region 4, suggesting that Florida Atlantic University be investigated as part of a compliance review; are you aware of that?

Mr. WILLIAMS. I am aware of that.

Mr. WEISS. OK. Do you know why Mr. Komer suggests that Florida Atlantic be investigated?

Mr. WILLIAMS. It's my understanding that the office received a complaint.

Mr. WEISS. Well, in the beginning, apparently he read an article about the school, describing a minority scholarship plan which he, evidently, believed was in violation of title VI. Now, Florida Atlantic University had instituted the plan, because the Florida State Board of Regents had directed it to increase its enrollment to maintain compliance with State minority enrollment requirements; that's true, isn't it?

Mr. WILLIAMS. I have no personal knowledge of that. If you are reading it from my document, then I would stand by the document.

Mr. WEISS. Was this the first time that a university in this country offered minority scholarships?

Mr. WILLIAMS. I would doubt that, very seriously, Mr. Chairman.

Mr. WEISS. Right. Now, are you aware as to whether Mr. Komer had discussions with anyone at the Washington Legal Foundations about using title VI to ban race-specific scholarships?

Mr. WILLIAMS. I have no personal knowledge as to whether Richard had any conversations with anyone at Washington Legal Foundation. I am aware that Washington Legal Foundation did file a complaint with the Department with regards to race-specific scholarships in the State of Florida.

Mr. WEISS. But you're not aware as to whether, in fact, they had been in consultation, Mr. Komer and the Washington Legal Foundation?

Mr. WILLIAMS. I have no personal knowledge of it.

Mr. WEISS. The Department received a formal complaint about Florida Atlantic University from the Washington Legal Foundation, subsequent to that memorandum. The complaint alleged that Florida Atlantic University was violating civil rights law by providing race-specific scholarships. Do you know whether Mr. Komer, or anyone else at the Department, discussed the complaint with at the legal foundation, before it was received by the Department?

Mr. WILLIAMS. I have no personal knowledge, either way, as to whether there was a discussion with anyone from OCR or the Department with the Washington Legal Foundation.

Mr. WEISS. Did OCR have the authority to formally investigate Florida Atlantic University, including the issuance of the letter of finding, without receiving a complaint of discrimination.

Mr. WILLIAMS. Yes, sir. We have—

Mr. WEISS. Now listen to my question carefully. Did OCR have the authority to formally investigate, to investigate, Florida Atlantic University, including the issuance of a letter of finding, without receiving a complaint of discrimination?

Mr. WILLIAMS. If you're using "investigate" to define complaints as opposed to compliance review—

Mr. WEISS. Right, you got it.

Mr. WILLIAMS. The format of a complaint investigation and compliance review is the same.

Mr. WEISS. But they're two different things, and you can't investigate and issue a letter of finding without a complaint; isn't that correct? That is correct.

Mr. WILLIAMS. No. We issue letters of findings with compliance reviews.

Mr. WEISS. But you can't do that on the basis of an investigation—you can't conduct an investigation—unless you received a complaint. You can undertake a compliance review on your own initiative; isn't that correct?

Mr. WILLIAMS. That's correct.

Mr. WEISS. OK. I've just told you the difference between a project review and a formal investigation. Now, is that why Mr. Komer originally asked region 4 to conduct a compliance review? Because the Department, your office, had not yet received a complaint about Florida Atlantic University?

Mr. WILLIAMS. I have no way of knowing why Mr. Komer directed a compliance review as opposed to a complaint investigation.

Mr. WEISS. Do you know the date on which the Department received the complaint from the legal foundation.

Mr. WILLIAMS. It would have preceded my being on the job, and so no, I do not.

Mr. WEISS. It was on May 10, 1990. And do you know the date on which Mr. Komer referred the Florida Atlantic case to region 4?

Mr. WILLIAMS. No, I do not, I have no personal knowledge of that.

Mr. WEISS. It was May 1, 1990. So, 9 days later, as a result of the complaint from the Washington Legal Foundation, did OCR central office, in fact, refer Florida Atlantic University for investigation?

Mr. WILLIAMS. I have no personal knowledge either way.

Mr. WEISS. But that is the case. Do you know the status of that investigation?

Mr. WILLIAMS. That investigation is continuing, it has not been completed.

Mr. WEISS. The complaint from the Washington Legal Foundation also alleges that minority scholarships offered by the University of Florida and the University of Nebraska are also illegal. As a result of the complaint, did you also ask that these schools be investigated, either as a part of a formal inquiry or a compliance review?

Mr. WILLIAMS. I have not directed that an investigation or compliance review take place at either University of Florida or University of Nebraska.

Mr. WEISS. But do you know whether there, in fact, are investigations ongoing, of those two schools?

Mr. WILLIAMS. At the University of Florida there is, not at the University of Nebraska.

Mr. WEISS. Well, those are all of the questions that I have at this point, Mr. Williams. I do hope that Mr. Komer decides to honor our invitation. I should say, in closing, that your testimony is a study on how not to change Federal policy. First, we have a new Assistant Secretary for Civil Rights, with no experience in civil rights law, who, in one of his first actions after being confirmed by the Senate, decides to reverse nearly three decades of law and policy.

Then, we learn that the policy isn't even your idea. It was the notion of the Deputy Assistant Secretary for policy, who apparently acts as the driving force for the new interpretation of title VI, possibly in conjunction with organizations outside the government.

The testimony further shows that in this mad rush to ban minority scholarships, you violated the Administrative Procedure Act, which is an act to avoid just such a situation, where laws are changed in secret, without public notice. And in the process, title VI itself, one of the most important laws of this century, is so badly twisted and misinterpreted that its original drafters would not recognize it.

I sincerely hope that in the new review ordered by Secretary Alexander, that none of these acts are repeated, and that the intent of title VI, to redress the discrimination suffered by minorities and to disallow any future discrimination, remains intact. Thank you very much, Mr. Williams, for appearing.

Mr. WILLIAMS. Thank you.

Mr. WEISS. Our second panel will consist of Dr. Ted Shaw, a law professor at the University of Michigan; Dr. Richard Rosser, president of the National Association of Independent Colleges and Universities; and Dr. Donald M. Stewart, president of the College Board.

Please step up and stand behind your chairs. As you know, we swear in all of our witnesses.

[Witnesses sworn.]

Mr. WEISS. Let the record indicate that each of the witnesses has responded in the affirmative. We have opening statements from you. They will each be entered into the record, without objection, in their entirety, as will other documents that we have referred to, and will be referring to in the course of the hearing. But we ask you to summarize your statement to no more than 7 minutes, if you can.

Dr. Shaw, if we can start with you.

STATEMENT OF DR. TED SHAW, PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

Dr. SHAW. Thank you, Mr. Chairman. I'd like to take the opportunity to thank you and the other members of the committee and the staff for inviting me to testify on this very important issue. As

a matter of background, I am a professor of law at the University of Michigan Law School; and prior to that, worked for 9 years as assistant counsel for the NAACP legal defense and educational fund, and also director of the west coast regional office of the legal defense fund; and, before that, worked in the Justice Department, Department of Civil Rights, starting in 1979, I left there in 1982, because of what was clearly a change in policy.

The views I express, however, are mine only. I do adopt the statement of the NAACP Legal Defense and Educational Fund, Inc., opposing the position of the Office for Civil Rights on minority-targeted scholarships. Like many other Americans, I was shocked and dismayed by the Office for Civil Rights' pronouncement in December 1990, that Federal law prohibited universities from administering minority targeted scholarships and the way that universities presumed they were able to administer them, under the interpretation of the *Bakke* decision.

Not only was this attempted policy shift a radical departure from the prior interpretation of title VI in its implementing regulations, it was ill conceived and ill advised, as a matter of social policy and also as a matter of educational policy.

While the Department of Education, in the face of a firestorm of public criticism, disapproval, and outrage, stepped back from that policy in its December 18 retreat. It still constitutes an unwarranted, unwise intrusion, and has distorted the applicable legal doctrine.

It invites confusion on the part of university officials who are attempting, in good faith, to remedy decades of centuries of exclusion and underrepresentation of minorities in higher educational institutions. Efforts to open the gates of historically white institutions of higher education are relatively recent, that is, approximately 25 to 30 years old, at best.

And as a statement of the NAACP Legal Defense and Educational Fund recounts, and as the chairman has recognized and Mr. Payne recognized, when Congressman Payne was here, they have had limited albeit important and significant effect; 5.7 percent of bachelor's degrees awarded in 1989 were earned by black graduates, down from 6.4 in 1976. And of 1989 master's degrees awarded, 4.6 percent went to black students, down from 6.8 in 1976. And for doctorate's, it was 2.4 percent, down from 3.3 percent.

Given these and other paltry statistics, it seems odd, if not invidious, that the Department of Education's Office for Civil Rights would choose to wage war on minority targeted scholarships. Equally troubling is the apparent invitation by a governmental department to white citizens to oppose minority targeted scholarships. An invitation which, fortunately, most Americans rejected.

Nonetheless, the fact is that the Department of Education's attempt to shift policy took place in a context where it was unwarranted and uninvited. Notwithstanding the ongoing national debate about the appropriate scope of affirmative action, there was, in fact, no great demand on the part of the public to eliminate, or curtail, minority targeted scholarships: A fact that is borne out by the widespread rejection of the policy pronouncements in December.

Unfortunately, however, the mere pronouncement of the proposed policy and OCR's analysis that would interpret Federal laws to prohibit most minority targeted scholarships conjures in the minds of some the image of minority students unjustly benefiting from substantial sums of scholarship funds, while white students are being turned away from the gates of higher education because similar funding is not available.

It reinforces the view promulgated by some that African Americans and other minorities are the most privileged in today's society, by reason of special treatment in the form of affirmative action of one kind or another, while white Americans are now the victims of racial discrimination.

It harkens back to a post Civil War Supreme Court decision, a few years after the end of slavery, in which a Supreme Court justice, impatient with remediation measures being sought by black supplicants to the Supreme Court, one, that just a few years after coming out of bondage, that African Americans must stop complaining about discrimination, stand on equal footing with whites, and cease their attempts to be "special favorites of the law."

It is precisely this same ahistorical impatience which enforms the efforts, in the name of color blindness, of those who would deem minority targeted scholarships to be violations of Federal law. When governmental officials take such positions, not only do they mislead the public down the path of further divisiveness, they default on their responsibilities to provide equal educational opportunities in higher education, and to remedy the sad history of discrimination which exists in this country.

Nothing in the applicable case law, whether it be *Bakke*, the *Croson* decision, or the FCC decision of last term, supports the Office for Civil Rights' present policy with respect to minority targeted scholarships. Justice Powell's opinion in regions of *University of California v. Bakke*, sanctioned the use of race as a proper consideration in an admissions decision, as long as it was not the exclusive decision. It did not speak to the issue of financial aid. However, it would be a hollow promise if black students were told you can be admitted to institutions of higher education, but the funding is not available.

The key to analyzing the policy that the Department of Education, through OCR, is now attempting to implement, as best as we can make it out, is the factor that minority scholarships are, in fact, not the only source of money available to students within the institutions that are under scrutiny. White students, in fact, are not being turned away from the doors of institutions of higher education because they do not qualify for minority targeted scholarships. In fact, the vast majority of scholarship funds are available to all students and to white students to compete for.

What is troubling, to me, about the policy and about Mr. Williams' testimony this morning, is that it is an attempt to rush headlong into a position which has no basis in either history or present-day reality. And that attitude is, in fact, evidenced by the way the Department of Education has failed to adequately investigate and pursue the historical discrimination that exists at the public institutions of higher education, the 17 States that were once under scrutiny, the 10 States that have been dismissed.

Those States, in fact, have been judged by a standard that is woefully inadequate, and some of them have been released from jurisdiction by OCR. Others are still pending under OCR's scrutiny, but the standard that they are applying is not a standard which looks at the results of efforts to promote educational opportunity for black students. It is rather a weakened standard which focuses on some kind of good faith attempt to substantially implement certain measures that they have committed to implement, regardless of what the outcome is.

In fact, it is ironic and telling that of the institutions that were being considered for the Fiesta Bowl, among those institutions were institutions which had a history of past discrimination which, in fact, had not been eliminated. The University of Alabama is now being sued by the Justice Department upon OCR's referral. The University of Louisville, as Mr. Williams pointed out, is part of a system which has not yet been released from jurisdiction by OCR.

In fact, OCR has taken steps and undermined efforts to increase the number of blacks in colleges and universities by reversing its historical position on higher education desegregation, by applying this new, good faith standard instead of the effect on desegregation standard that the law required in the past.

As a result of this new standard, OCR has released at least six State systems of higher education from further obligations, to take steps to dismantle segregated systems. Other States are, as I indicated, currently under review.

Of the States involved in the Fiesta Bowl, as we've indicated, one is the University of Louisville, and other States involved were formally *de jure* States. The standards of title VI compliance used by OCR are minimum, and not maximum, standards. They do not prohibit further measures to dismantle these *de jure* systems of higher education. This is especially true in light of OCR's new good faith standard for compliance and its failure to focus on the actual success rate in eliminating the vestiges of prior discrimination.

As I've indicated, *Bakke* did not call for the complete elimination of race as a factor in determining admissions. It did not speak to the issue of financial aid at all. And it would, indeed, be ironic, as Mr. Williams testified, if the Federal Government were allowed to engage in affirmative action in the form of minority scholarship plans, as it's indicated it wishes to do, through legislative and other measures.

And yet, States which themselves were the progenitors of intentional *de jure* discrimination would be prohibited from administering minority scholarships.

I might add that, in another capacity, I served on the board of trustees of my undergraduate institution, Wesleyan University, in Connecticut. And that is an institution which has a commitment to a minority presence on campus that runs about a quarter of a century now. One of the concerns has been—and I don't speak for Wesleyan now, but I speak as a former board member, in my individual capacity—one of the concerns has been the low number of minority students who are going into graduate and doctoral programs. Therefore Wesleyan, like other institutions, set up a minority scholarship fund. That fund is targeted, specifically, for black and other underrepresented groups.

That fund would not be as effective if, in fact, the standards that were applied were to be a standard that focused on economic status, on underrepresentation, or some other basis. It certainly would not be as effective. And here's the reason why: Although African Americans are disproportionately poor, the vast majority of poor people in this country, as we know, are not African American; they are whites.

And I would support programs which expand scholarship opportunities for all students, including poor white students. And I think Congressman Sanders has put his finger right on the point, that part of the reason that we're in the bind we're in now, and the reason this is so divisive, is because we have an administration which has, for the past several years, or the past decade, or so, drastically cut back on the amount of financial aid that is available, flowing from the Federal Government.

And yet, that same Federal Government turns around and announces, without any invitation, a policy which would then pit those who are fighting over the crumbs, against one another. That is cynical. And it's something that I think needs to be addressed. I don't think it's good enough for the head of OCR to say, "That's not within my bailiwick. That's a problem that I recognize, but all I'm going to do is look at enforcing the law, and do it in this way that's so divisive."

The point, though, is that scholarship programs which would be implemented for disadvantaged students, while they would undoubtedly benefit some black students, would overwhelmingly be white, simply because of the absolute numbers of poor white students who would be eligible for those programs, and they would not address the severe underrepresentation of African Americans and other minorities in these graduate and professional schools.

Mr. WEISS. Could you bring your comments to a close?

Mr. SHAW. Yes. I also worked on a case which you're familiar with, which is *Guyer v. Tennessee*, and that is a case that involved former Governor Alexander's home State. There was a scholarship program that was established, pursuant to the litigation that sought to desegregate higher education. That was challenged by the Justice Department, it was upheld by the Sixth Circuit Court of Appeals, the Supreme Court did not take that case.

It is clear that these scholarship funds are appropriate in instances where there is past historical discrimination, some of the very institutions that Mr. Williams sought to single out in the Fiesta Bowl incident, are institutions that fall under that category.

I hope that the new Secretary of Education backs away from this policy as far as he can go, which is all the way, and interprets the *Bakke* decision and the applicable case law in the way that it was interpreted by OCR in its own regulations, in its administrative decisions, prior to the announcement of this ill-conceived policy.

In fact, a government, by press release, suggested that there is another agenda. It is not true to say that they simply took these complaints and are trying to address protecting all persons. This is an effort of those who have a particular agenda to reach a point of color blindness when we simply aren't there yet.

Finally, I'd like to say, and I can't resist this, although it may be an indiscretion, that I had an uncomfortable feeling sitting here, at

first, and watching a panel of Members of Congress, most of whom are white, questioning a black head of OCR, in which he was defending a policy that curtailed and cramped and limited minority scholarships, while you were seeking to expand his reading of the law.

But upon reflection, I thought to myself that, actually, this might be something that I should be consoled about. In fact, it reflects that we're making a great deal of progress if, in fact, you are taking the lead on this issue and pushing this individual, the Department, and the administration to continue the efforts to expand minority opportunities. I'll take any questions at any time.

Mr. Weiss. Thank you, Dr. Shaw. We'll hold questions until we've finished with the testimony of all of the panelist.

Dr. Rosser.

STATEMENT OF RICHARD ROSSER, Ph.D., PRESIDENT, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

Dr. ROSSER. Mr. Chairman, Mr. Sanders, thanks so much for the opportunity to testify. This is an extremely important issue, and I want to thank you in particular, Mr. Chairman, for your oversight of this Office for Civil Rights. I think we have all seen this morning how necessary and helpful this is.

Mr. Payne commented about the confusion out there as a result of what we have seen over the last few months. Believe me, it's not just confusion, it is chaos, in terms of understanding where we are going and where we will end up. Mr. Hobson talked about the chilling effect of all of this on parents and students. And believe me, it is a chilling effect. What does this country seem to mean in terms of its attitude towards helping us bring minorities into higher education?

Now, I'm testifying on behalf, of course, of the National Association of Independent Colleges and Universities, 1,600 schools, but I'm also here on behalf of the American Counsel on Education. So I'm going to be talking, to some degree, about all higher education, but more specifically, about private higher education, because private higher education has been affected more than any other sector, I would argue, because of what started last December.

We've always had a commitment to access, in our private colleges and universities, and to diversity. It isn't widely known today that, in terms of family income, family incomes of students going to private colleges and universities now are essentially the same as the family incomes of students going to 4-year State universities.

Another thing—and this gets to the point of what we are talking about today—we now enroll essentially the same percentage of minorities in private colleges and universities as do State colleges and universities. And the minority percentage on our campuses is increasing faster than it is at State colleges and universities. Why is this?

It's because we are putting massive amounts of financial aid into play to enable students to come to our institutions. Unfortunately—and Mr. Sanders, I'm delighted that you mentioned this—Federal aid is going down, to our students. State aid was doing fairly

well in some States, but now that so many States are in economic difficulty, they're having to cut it.

On the contrary, because of this, we have increased our own commitment, from our own private institutions, to something like \$4 billion this year. That's undergraduate and graduate. That is more than all the Federal aid, including the subsidy on the Stafford loans, that will come to students in private colleges and universities.

Now, this means, if we put this in terms—and Mr. Shaw referred to this—65 percent of our students are now receiving financial aid—and obviously, that is from all ethnic backgrounds. Seventy-two percent of our Hispanic students are on aid, and 82 percent of our Afro-American students. Again, I don't need to explain that. How have we been able to do this, not just the amount of aid, but clearly, these special programs we're talking about?

We've had special scholarships for years—you would know these; you've seen them listed in college catalogs—for ethnic groups, for minorities, for men, and incidentally, also for women. And I might note—this has not come up, but one of the things that Mr. Williams announced back in December that he was going to investigate, was a question of sexual discrimination as it would relate to various programs. Why shouldn't we then raise into question any scholarship specifically for men or for women?

Now, we thought we were following national policy. Again, we had the Civil Rights Act of 1964; we had the *Bakke* decision, as you said, Mr. Weiss; we then had, I think, within a few months after that, a clarifying statement from the Department, saying that *Bakke* did not limit these scholarships. We had specific departmental rulings—this famous letter to MIT in 1981, saying that minority scholarships for engineers were perfectly legal. We had the regulations, which, of course, as we know, have never been rescinded. And then, Secretary Cavazos for months had as his major theme increasing minority participation in all of education, but in particular, in terms of higher education.

But even without all of this, our schools, our private colleges, thought they were doing the right thing and the necessary thing. This society is not colorblind; we all know that. We all hope we will get to that point where it is colorblind, but not at this point.

Believe me, before I took this job I spent 10 years as president of DePauw University, in Greencastle, IN. We had to have minority scholarships to get students to DePauw University. This is true, I would guess, of the majority of our private colleges and universities—which historically, of course, were essentially white institutions. We had to reach out and indicate to minorities that they really were wanted.

Before last December, frankly, we didn't know how many programs we had among our colleges; we never had to ask. The question was never even raised. But a few days after Mr. Williams revealed what is now apparently no change—we thought it was, at the time—we sent out a survey to all of our schools—incidentally, that was on Friday, December 14, and then, on the following Tuesday, we had the famous press conference with the release of December 18. I then sent out another letter after that, saying, "By the way, would you tell us how many of these scholarships are

funded out of institutional funds?" That question had never been raised before.

These were the results: Nine out of ten independent colleges and universities now have some kind of scholarship, one or more, specifically for minorities. One out of two of our graduate institutions have scholarships specifically for graduate students. Most include, of course, financial need, or merit, or some other qualification. We're now talking about 15,000 undergraduate scholarships for minorities, about 1,200 graduate scholarships. The average undergraduate grant is \$6,800, \$9,000 for graduate students. And 80 percent of this money comes out of institutional funds—a very critical point, as you know.

Well, where are we now? We have this December 18 press release, which I think we need to give some attention to, because to me, this must reflect some very careful thinking, or at least so they thought, by the administration. I do not believe that is a Department of Education press release. I think that is a carefully thought-out policy by the administration.

Whether or not it was ever legal—I mean, we all thought that if it were not legal, it clearly soon would be, or the attempt would be made to make it legal. We were very encouraged when Secretary Alexander indicated during his confirmation hearings that he wanted to pull that back. But yet, I know he was quoted on the "Today Show," yesterday morning, as saying he didn't think that there ought to be distinctions based upon race.

So I must say, I have to come back to this December 18 memo and just indicate to you the problems that we see with it. First of all, the administration starts out by saying it believes in voluntary affirmative action, and I was very happy to see that. The press release also—it doesn't say this, but clearly the implication is that congressionally directed scholarships are perfectly legal.

State and local government—and I don't know which local governments give scholarships, but anyway, that was in there—State and local government scholarships would be left to the courts; the Department had no administrative method of endorsing these.

But then they got to private colleges and universities, and said it was perfectly OK if we used outside funds which were given to us; we could not use our own funds. Now what is more voluntary than the use and designation of our own funds? Frankly, this distinction is so bizarre that we just cannot understand it, to this day.

Incidentally, we called up the Department the next day, and they said that word "private" should not have been in there. I haven't heard this this morning. The word "private" should not be in there, so therefore all institutionally provided scholarships by State institutions, are also in question. Incidentally, there are many of those, as I think you will hear later.

Then, we had this 4-year transition period, but yet, now I hear that things will be held up for 6 months—we have those seven complaints—will be held up for 6 months. But then, after that, the Department apparently feels that it will have to take action. So this 4-year transition period—how can you feel safe with that, if the Department had to investigate, if it would be called upon to do so?

So consequently, we are very uneasy about this whole situation. We think it needs to be resolved, as quickly as possible. Right now,

we have students trying to decide whether or not they're going to come to our schools next year. We've got our colleges and universities wondering what they should do about these programs. They'll stick with them, but they are not very sanguine. We simply don't know.

In my view, the only solution is to go back to where we were with this guidance, this departmental regulation, these interpretations which served us so well for so many years. Because, if we do not do that, if we end up somewhere in the middle, this is going to have a devastating effect, I think, in setting back our attempts to really make ourselves accessible to minorities from all walks of life. Thank you very much.

[The prepared statement of Dr. Rosser follows:]

STATEMENT OF
RICHARD F. ROSSER, PRESIDENT
NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES

ON BEHALF OF THE
NATIONAL ASSOCIATION OF INDEPENDENT
COLLEGES AND UNIVERSITIES
AND THE
AMERICAN COUNCIL ON EDUCATION

ON
POLICY REGARDING MINORITY SCHOLARSHIPS
OF THE
OFFICE FOR CIVIL RIGHTS
U.S. DEPARTMENT OF EDUCATION

BEFORE THE
SUBCOMMITTEE ON HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

MARCH 20, 1991

Thank you, Mr. Chairman and members of the committee. My name is Richard F. Rosser, and I am president of the National Association of Independent Colleges and Universities (NAICU). The American Council on Education (ACE), an umbrella organization representing all sectors of American higher education, joins NAICU in this statement. I am very pleased to testify before you today on an issue that is critically important to our members: financial assistance in the form of scholarships for members of minority groups -- and women as well.

Background

NAICU's membership includes more than 840 colleges and universities. Our membership is as diverse as the nation itself. NAICU institutions include traditional liberal arts colleges, major research universities, church- and faith-related colleges, historically black colleges and universities, women's colleges, junior colleges, and schools of law, medicine, engineering, business, and other professions. This extraordinary diversity offers students a wide selection from which to choose the type of education that will best serve their interests, needs, and aspirations.

Enrollments at independent colleges range from fewer than 100 to more than 30,000 students. While we enroll 21 percent of all students, we award 33 percent of all baccalaureate degrees, 40 percent of all master's degrees, 36 percent of all doctoral

degrees, and 60 percent of all first professional degrees in fields such as law, medicine, engineering, and business.

Commitment to Access

NAICU institutions are committed to increasing the enrollment of minorities in our institutions. In 1988, the year for which the most current statistics are available, the proportion of minority students enrolled in four-year independent colleges and universities was 18.2 percent, compared with 17.8 percent in four-year state-supported institutions. Of the 18.2 percent minority enrollment in our colleges, 8.1 percent were African Americans, 6.2 percent were Hispanics, 3.5 percent were Asian Americans, and 0.3 percent were native Americans.

In order to increase the minority enrollment in our institutions, we must provide financial assistance where needed, and we do. According to the latest figures from the Department of Education, 82 percent of all African American undergraduates attending independent colleges and universities received financial assistance, as did 72 percent of all Hispanic undergraduates, and 59 percent of all Asian American undergraduates. In 1986, 309,000 minority students attending public and independent colleges and universities received a total of three-quarters of a billion dollars in aid from the institutions' own resources.

In order to assess the impact of the U.S. Department of Education's interpretation of the legal status of scholarships designated for minorities, the National Institute of Independent Colleges and Universities (NIICU) sent a questionnaire to its member institutions. The survey was returned by 315 institutions. These responses have been statistically weighted to reflect approximately 1,600 independent colleges and universities nationally. The results of the survey are attached to this statement.

NIICU found that nearly nine out of ten independent colleges and universities have one or more scholarship programs designated for minority undergraduate students. Half of our institutions have programs designated for minority graduate and professional students. Most programs use factors other than race, including financial need and academic merit, as criteria for making an award. Only 13.7 percent of the programs and 2.8 percent of the funds are earmarked for scholarships awarded solely on the basis of race.

Nearly 16,300 students receive awards under these programs -- 15,100 undergraduate and 1,200 graduate students. Approximately \$114 million in aid is provided for this purpose. The average undergraduate recipient receives \$6,800 from these programs, and the average graduate student receives \$9,000. More than three-quarters (79.3 percent) of the funding for these programs comes

from the institutions' own resources. The remainder comes from federal (7.0 percent), state (3.8 percent) and other sources (9.9 percent). Nearly one-quarter of institutions reported that they were able to meet the full calculated financial need of all admitted undergraduate students.

The New OCR "Policy"

The progress we have made in increasing the enrollment of minorities was seriously undermined by the announcement from the Education Department's Office for Civil Rights (OCR) that our schools run the risk of violating the Civil Rights Act of 1964 if they award race-specific scholarships. In Assistant Secretary Michael L. Williams's letter of December 4, 1990 to John Junker, executive director of the Fiesta Bowl, Williams stated that "the Title VI regulation includes several provisions that prohibit recipients of ED funding from denying, restricting, or providing different or segregated financial aid or other program benefits on the basis of race, color, or national origin. . . . OCR interprets these provisions as generally prohibiting race-exclusive scholarships." The letter goes on to say that "the universities that those students attend [the University of Louisville and the University of Alabama] may not directly, or through contractual or other arrangements, assist the Fiesta Bowl in the awarding of those scholarships unless they are subject to a desegregation plan that mandates such scholarships."

On the heels of the justifiable outrage expressed by members of the higher education and civil rights communities, OCR reversed its controversial policy announcement -- but only partially. We are now told that while "the administration fully endorses voluntary affirmative action in higher education, and encourages educational opportunities for minority and disadvantaged students. . . ED has decided that the Title VI regulations will be enforced in such a way as to permit universities receiving federal funds to administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students." It goes on to say that "under Title VI, however, private universities receiving federal funds may not fund race-exclusive scholarships with their own funds." [See U.S. Department of Education News Release, Dec. 18, 1990.]

We are relieved that OCR has begun to modify its position regarding minority scholarship programs. It now believes that scholarships (such as those awarded by the Fiesta Bowl) that are specifically reserved for minority students are consistent with Title VI of the Civil Rights Act of 1964. However, OCR has added to the confusion about what is permissible for colleges and universities that award scholarships to minority students from all other sources. It has drawn a distinction between restricted funds and other funds available to private colleges and universities to award minority scholarships. By doing so, OCR seems to suggest that private colleges and universities may accept money

from donors who designate that it be spent on minority scholarships, but they cannot use their own funds for the identical purposes. This notion is patently absurd, and has no legal foundation.

The new OCR policy also conflicts with the department's appeal to colleges and universities to find ways to enroll and retain minority students. Its endorsement of voluntary affirmative action rings hollow and effectively ties our hands, preventing us from practicing what OCR preaches.

The administration's review of the OCR policy shows that it understands the importance of increasing the number of minorities on our campuses -- hence the rapid revision of Assistant Secretary Williams's first announcement. But the revision continues to reflect a fundamental lack of knowledge about the way colleges and universities finance their student aid programs, the overwhelming majority of which use unrestricted funds. In fact, 61.5 percent of all scholarship and fellowship expenditures by both public and private institutions in 1985-86 were derived from unrestricted funds. [See U.S. Department of Education, National Center for Education Statistics, "Financial Statistics of Institutions of Higher Education," 1985-86.] Moreover, the NIICU survey corroborates our view that the overwhelming majority of race-specific scholarships awarded by independent colleges and universities are funded from the institutions' own resources.

Private colleges and universities use money from a variety of sources, including restricted scholarships (which are very few in number) and contributions from alumni and others, to provide financial aid. This aid is awarded to students based on need; talent in particular fields such as athletics, music, and science; and diversity. Scholarships have enabled us to enroll an increasing number of minority students who have been historically underrepresented on our campuses. Now the OCR tells us that our efforts to promote diversity violate federal law.

This new policy comes after a decade of guidance from the federal government indicating that scholarships targeted for minorities were legal. For example, in response to a complaint filed against the Massachusetts Institute of Technology (MIT) concerning its Minority Tuition Fellowship Program, the Office for Civil Rights at the Department of Health and Human Services concluded that MIT did not violate Title VI of the Civil Rights Act of 1964 by excluding the complainant from its program. [See letter of the Department of Health and Human Services to unnamed complainant, Complaint Number 01-30-2046, Sept. 30, 1981.]

In its letter of findings dated September 30, 1981, OCR wrote: "The Title VI Regulations state that ' . . . a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limited participation

by persons of a particular race, color, or national origin." It also cited the illustrations given in the regulations regarding permissible voluntary affirmative action:

"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service." (Emphasis added).

[See also letter of R. Randolph, Acting Director, OCR, U.S. Department of Education, to Dr. Paul F. Gray, President, MIT, September 30, 1981, in which ED reached the same result.]

The OCR in the Department of Education reached the same conclusion in 1982: "The [Title VI] Regulation explains that remedying the effects of past discrimination may require more than the application of a race-neutral policy and . . . that voluntary affirmative action in the absence of past discrimination may include race-conscious behavior." [See U.S. Department of Education, Office of the Assistant Secretary for Civil Rights, letter of Burton Taylor, Director, to unnamed complainant (March 24, 1982).]

To my knowledge, the OCR regulations cited in these letters of findings (34 C.F.R. Section 100.3(b)(6)(ii) and Section 100.5(i))

have not been rescinded or revised in any manner. To do so would require notice in the Federal Register and opportunity for the public to comment. We have seen no such notices. Thus, we must question the procedural and legal bases for the recently announced policy change that clearly conflicts with the policy embodied in the above-mentioned letter of findings.

Moreover, none of the Supreme Court decisions that may be relevant in this case support the OCR's policy reversal. [See e.g., Regents of the University of California v. Bakke, 438 U.S. 265 (1978); and City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).] In fact, OCR found in 1983 that the Bakke decision, which was based on a controversial admissions policy at the University of California at Davis, was not controlling as to the award of financial aid. It went on to state that the use of voluntary affirmative action efforts was consistent with Bakke. [See Department of Education Memorandum to Gilbert D. Roman, Regional Director, Region VIII, from Joan Standlee, Deputy Assistant Secretary for Civil Rights, regarding policy clarification re Title VI and minority fellowship programs at the University of Denver (March 22, 1983).]

In 1989, OCR reportedly dismissed a complaint against the University of Colorado Medical School, which awarded financial aid to minority students under the Patricia Roberts Harris Fellowships program. [See Washington Post, December 15, 1990.] This is a

program created by Congress and administered by the Department of Education. It is ironic that the department approves of federally funded scholarships that Congress establishes for groups traditionally underrepresented in higher education, but not of privately funded efforts initiated by the colleges themselves to achieve the same goals. Surely the drafters of the Civil Rights Act of 1964 did not intend this result.

The steps that our colleges have taken and will continue to take to increase the number of underrepresented students on our campuses are entirely consistent with the nation's policy to promote equal educational opportunity for all Americans. The legislation that the 101st Congress considered (and in one case approved) exemplifies the goal of providing access to higher education for all students. For example, the Twenty-First Century Teachers Act (H.R. 4130) would have awarded financial assistance to institutions of higher education for programs to identify, recruit, and retain students to enter the teaching profession. In this legislation, minorities were specifically earmarked for assistance. In the Excellence in Mathematics, Science and Engineering Education Act, Public Law 101-589, signed into law by President Bush on November 16, Congress stated that "women and minorities are significantly underrepresented in the fields of mathematics, science and engineering," and that its national objective was, among other things, to "substantially increase the number of women

and minorities pursuing careers in mathematics, science and engineering." Title IV of the legislation is specifically targeted to encourage women and minorities to enter the math, science, and engineering fields.

You are no doubt aware of the minority and gender-based scholarships provided under the Higher Education Act of 1965 as amended, including the Patricia Roberts Harris Graduate Fellowships for financially disadvantaged women and minorities, which was funded at \$17.6 million in FY 1991, and the Minority Participation in Graduate Education Program, funded at \$5.9 million in FY 1991. What we are doing in higher education with our own resources is no less important. Our goal is the same -- to recruit and retain minority students and women, who have been historically under-represented in higher education.

I have suggested in my testimony that gender-based scholarships are in jeopardy under the OCR's recent interpretation of the law. Title IX of the Education Amendments of 1972 derives from and is analogous to Title VI of the Civil Rights Act of 1964. [See 20 U.S.C. Section 1681 et seq.] Thus, programs established by many colleges and universities for the purpose of recruiting and retaining underrepresented women in various academic and professional fields may also be of questionable legality.

The Quota Issue

I wish to emphasize that scholarships used to recruit and retain underrepresented minorities and women are not quotas. Quotas deny access to higher education, and without a court order, may be illegal under both the Constitution and federal statutes. Minority or gender-based scholarships do not establish or constitute a barrier. While scholarships may make it easier for minority students to attend a given institution, they guarantee neither entry to nor graduation from an institution.

The OCR under Alexander's Leadership

The OCR policy leaves many issues unresolved. For example, the December 18, 1990 statement does not make clear whether programs that consider factors in addition to race (but for which race is the primary criterion or is given substantial weight) are consistent with Title VI. May "race-plus" criteria be used to benefit subgroups (e.g. African Americans and Hispanics) and not others (e.g. Asians), where the latter group is not underrepresented in the student population? What if race-exclusive scholarships are only part of a larger pool of student aid funds and nonminorities are in no way barred from receiving other aid to attend college?

During his confirmation hearing on February 6, 1991, Secretary-designate Lamar Alexander testified that he would restore the status quo prior to the December 4, 1990 announcement and would initiate a review of the entire issue. While we are pleased that Governor Alexander has rescinded the December 4 and 18 press statements, we must urge that any review proceed "with all deliberate speed," as the Supreme Court urged in Brown v. Board of Education. Colleges and universities should not be left painfully waiting until the confusion created in December is finally resolved.

Secondly, the OCR review should not result in a restoration of the December policies. There is nothing in the spirit or the letter of the civil rights law that justifies the conclusion that private colleges and universities may not use their own resources to fund minority scholarships. Nor, would we argue, is there anything to support OCR's absolute bar of scholarship programs that take race into account.

Thirdly, no institution whose financial aid policies are scrutinized during this review and who fully cooperates with OCR's investigation should be exposed to undue liability or prosecution. Finally, we must urge that all future policies enunciated by OCR be issued using the notice and comment process set forth in the Administrative Procedure Act. At the very least, OCR should not engage in policymaking by press release. Such actions undermine

the democratic principles that are the foundation of the administrative rulemaking process.

We hope that Secretary Alexander will work with NAICU and other members of the higher education community to achieve a policy consistent with the purposes for which the Civil Rights Act was established.

Conclusion

The National Association of Independent Colleges and Universities calls upon the administration to rescind permanently and unequivocally the policy directive embodied in the Education Department's December 18, 1990, news release. If the administration does not exercise leadership in this issue, it will call into question virtually every financial aid program of every private college and university in the country, create chaos on our campuses, instigate a barrage of unwarranted litigation, further discourage minority students from applying to college, and exacerbate the severe shortage of educated workers that this nation will face in the next century.

Thank you, Mr. Chairman, for your leadership and vigorous oversight of OCR throughout the years. We value your commitment to equal opportunity in education.

#

-14-

FINAL RESULTS
 NIICU SURVEY ON MINORITY SCHOLARSHIPS AT
 INDEPENDENT COLLEGES AND UNIVERSITIES

In order to assess the impact of the U.S. Department of Education's interpretation of the legality of scholarships designated for minority students, NIICU sent a questionnaire to its 826 member institutions. The following summary is based on 315 responses that have been statistically weighted to reflect approximately 1,600 independent colleges and universities nationally. All data refer to the 1990-91 academic year.

- Nearly nine out of ten (89.3 percent) independent colleges and universities have one or more scholarship programs designated for minority undergraduate students. Half (49.3 percent) of independent institutions have scholarship programs designated for minority graduate and professional students.
- In addition to race, most programs (86.3 percent) and most of the funds (97.2 percent) include financial need, academic merit, or other factors among the criteria for making an award. Just 13.7 percent of the programs and 2.8 percent of the funds are for scholarships in which race is the sole criterion for making an award.
- Approximately 16,300 students receive awards under these programs -- 15,100 undergraduates and 1,200 graduate and professional students.
- Independent colleges and universities award approximately \$114 million in aid under these programs. Most (90.8 percent) is for aid to undergraduate students.
- The average award is \$6,800 per undergraduate student and \$9,000 per graduate student.
- The institutions themselves are the principal source of funds for these programs. More than three-quarters (79.3 percent) of the scholarships are from institutional resources. The remaining portion comes from federal (7.0 percent), state (3.8 percent) and other (9.9 percent) sources.
- Approximately one-quarter (24.5 percent) of independent colleges and universities reported that they are able to meet the full calculated financial need of all admitted undergraduate students.

3/91

Mr. WEISS. Thank you, Dr. Rosser.
Dr. Stewart.

**STATEMENT OF LAWRENCE GLADIEUX, WASHINGTON DIRECTOR,
THE COLLEGE BOARD, ON BEHALF OF DONALD M. STEWART,
PRESIDENT**

Mr. GLADIEUX. Thank you, Mr. Chairman. My name is Larry Gladieux, I'm Washington director of the College Board. Don Stewart, president of the College Board, sends regrets, he feels very deeply about this issue.

Mr. WEISS. My apologies to you.

Mr. GLADIEUX. That's all right. He feels very deeply about this issue, wanted to deliver his statement himself, today, but last minute circumstances made that impossible.

Mr. WEISS. Well, you know we have his prepared statement; that's in the record, in it's entirety, and I hope that you would simply summarize his, or your, thoughts.

Mr. GLADIEUX. I will do so, very briefly. Last December, when this issue first came in to the national spotlight, the College Board, which represents 2,700 member schools and colleges, expressed opposition to the apparent change in policy by OCR. We were concerned about the legal implications, but more immediately, we were concerned about the chilling effect, which has been mentioned several times this morning, the negative signal that is sends to young people.

Don Stewart submitted testimony to the Education and Labor Committee at that time, and Don Stewart, who is an African-American himself, delivered a personal and direct message to minority students, and I think that bears repetition now.

He said to students, "Do not be discouraged. The recent controversy over minority scholarships may be confusing, but the opportunity and the funds are still there. Don't let an ill-timed and ill-considered press release by one Federal official in the Department of Education deter or shatter your dream of higher education."

At the College Board, we operate the college scholarship service, and we have learned, over the years, that even the discussion of possible cuts in financial aid for college-bound students creates the impression that aid has, in fact, been reduced or eliminated. And as a result, many may not apply for the aid that is there for them, and that they need. That happened in the early 1980's, with the headlines about major cuts, or elimination, of Federal student aid. The announcement on race-based scholarships, in December, no doubt has had something of the same, again, chilling effect.

Minority scholarships are only one strategy, but an important strategy in democratizing access to higher education and fostering diversity on our campuses. Like the National Association of Independent Colleges and Universities, we have conducted a survey of our College Board members on the awarding of such scholarships. And the preliminary results might help to put this issue in perspective and will supplement the NAICU survey.

In our survey, we found that about 1,000 public and private colleges award some type of minority scholarships. But only 10 percent of those colleges awarding minority scholarships award any of

that aid exclusively on the basis of minority status. The other 90 percent considered financial need or other criteria, such as academic standing or leadership, in addition to minority status.

And overall, relatively small percentages of financial aid are involved. At the schools offering minority scholarships, only 4 percent of all grants and scholarships are awarded on the basis of minority status plus financial need. Three percent are awarded on the basis of minority status plus some other criteria, besides financial need. Only 0.3 percent of grant scholarship awards are made on the basis of minority status exclusively.

Any policy or action by the Office for Civil Rights that would end these programs, or put a cloud over these efforts, sends the wrong signal and points us in the wrong direction. We urge the new Secretary of Education to clear away the fog and unequivocally rescind the December policy statements by Mr. Williams and by Office for Civil Rights.

If these policies, or apparent policy changes, are allowed to stand, the clear message it will send to young minority men and women is that their options are limited. Coming after so many years of trying to encourage broader and fairer access to a higher education, as a matter of social justice and for our economic well-being as a country, that would be a tragic outcome.

Our testimony boils down to two messages: To minority students: Do not be discouraged; the aid is still there; it's still possible to go to college. And to the new Secretary of Education: Please clear away the fog. Thank you, Mr. Chairman.

[The prepared statement of Mr. Stewart follows:]

The College Board

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 (215) 896-7300

Washington 279-04

WRITTEN STATEMENT

by

DONALD M. STEWART

PRESIDENT, THE COLLEGE BOARD

to the

HOUSE GOVERNMENT OPERATIONS SUBCOMMITTEE ON HUMAN RESOURCES

U.S. CONGRESS

MARCH 20, 1991

I want to commend the Chair of this subcommittee, Representative Ted Weiss, for convening today's hearing and for providing a forum to discuss further the awarding of race-specific scholarships. On behalf of the College Board's 2800 member schools, colleges and universities, I am pleased to offer testimony on an issue of such importance not only to minority students, their educational access and opportunity, but also to the vitality of American education.

Last December, when this issue first came into the national spotlight as a result of Assistant Secretary for Civil Rights Michael Williams abrupt announcement limiting the use of race-specific scholarships, the College Board expressed its opposition to the policy. I was concerned not only with the legal implications of the announcement, but also with the damaging and negative effect it might have on the educational hopes of minority students. As a *Washington Post* editorial stated, "the signal sent might discourage not only applicants, but also institutions that might fear legal or other governmental impediments in perfectly constitutional efforts to channel certain grants to poor minority youths."

This message to students at that time bears repetition now: Do not be discouraged. The recent controversy over minority scholarships may be confusing. . . But the opportunity and the funds are still there. Don't let an ill-timed and ill-considered press release by one Assistant Secretary in the Department of Education deter or shatter your dream of higher education.

In the intervening months, I have been encouraged by the statements of Secretary of Education Lamar Alexander during his nomination hearings when he noted that the policy announced by Mr. Williams created "a massive amount of unnecessary confusion"; further, he said colleges needed to tell minority students that "we want you in" and no college should "slow down" in its effort while waiting for the Department to clarify the issue. The Secretary's announced plan to fully review the policy on minority scholarships in consultation with college and university officials, the Justice Department and members of Congress is good news; I urge him to proceed quickly on this.

As the President of the College Board, an educational association serving students, schools and colleges through programs designed to expand educational opportunity, I have learned over the years that even the discussion of possible cuts in financial aid for college-bound students creates the impression that aid has in fact been reduced or eliminated. And as a result many may not apply for the aid that they need--and is there for them. I do not want that to happen in this most recent and unfortunate controversy.

As an educator, and an African American, I take pride in the progress that has been made since I was a college student in the number of minorities going to college. It should be noted for the record that the number of black men and women attending college has increased over the past decade, as has the number of Hispanic men and women. The scores of African American students on our SAT exams have increased significantly over the past 10 years, even as those of white students have remained the same. And the number of minority students taking and doing well in our Advanced Placement courses has increased by 159% since 1985.

And yet, even though significant progress has been made, much remains to be done. Over the past decade the number of black and Hispanic men and women graduating from high school has grown more swiftly than the number going on to college. As a consequence, for example, the proportion of black high school graduates aged 18 to 24 going to college has leveled off. On a percentage basis, it has remained at 28 percent in the decade of the 1980s. More ominously, the American Council on Education reports that degree attainment for these groups has declined in recent years. Thus, Mr. Williams chose the worst time, when minority college enrollment rates are stagnant, to issue the reversal in policy.

Minority scholarships have been recognized as an essential strategy in encouraging diversity in the college and university student population. I agree with Donna Shalala, Chancellor of the University of Wisconsin at Madison, that no college or university can any longer call itself great unless its administrators, faculty, programs and students fully reflect the rich, multicultural diversity of contemporary America. On a legal basis, Title VI of the Civil Rights Act of 1964 has long been interpreted and implemented to permit minority scholarship programs, either as part of court-ordered or department-approved desegregation plans or as legitimate efforts to increase the number of underrepresented minorities on campus and to promote diversity.

Last December, when first confronted with this issue, there was a dearth of information about the numbers and amounts of these scholarships at various higher education institutions. From our College Board Annual Survey of Colleges, we knew that approximately 1,000 institutions awarded aid that was based at least in part on minority status. We sent a followup survey to these thousand schools, seeking more information on their awards. The findings are summarized in the attached tables; I will just highlight a few of the survey's preliminary findings here.

- Only 10 percent of the colleges awarding minority scholarships do so exclusively on the basis of minority status. The others consider financial need or some other criteria such as academic standing or leadership.

-3-

- At the schools with minority scholarships, 4 percent of grants/scholarships are awarded on the basis of minority status plus financial need. 3 percent are awarded on the basis of minority status plus some other criteria besides financial need. Only 0.3 percent of grant/scholarship awards are made on the basis of minority status alone.
- Overall, institutional funds are the major source of both minority grants/scholarships based on need and minority grants/scholarships where factors such as academics are considered. Restricted funds are the second largest source of such awards, and public funds third. The proportions of funds provided for minority grants and scholarships from different sources varies significantly among institutional sectors, however.

At the thousand colleges awarding minority grants and scholarships, 76 percent of the awards where financial need is a consideration come from institutional and restricted sources. 83 percent of the awards for minority students who also excel at such things as academics and leadership, but who do not have financial need, come from institutional and restricted funds. Clearly, these colleges believe that such awards are a priority.

The needs of our minority youth are apparent and we should learn from the response of our higher education institutions and their donors.

Any policy or action by the Office of Civil Rights that would end these programs would not only undo the progress we have made in increasing the diversity of students on campuses, but it would also have a secondary consequence of discouraging potential donors from giving to higher education in general.

Despite the attempts by the Office of Civil Rights to clarify the initial statements, there are still many unanswered questions. I urge the new Secretary of Education to put the uncertainties created by Mr. Williams' announcement last year aside. As the new Secretary assumes his position in the Cabinet I urge him to place high on his agenda the thorough review of the minority scholarship issue that he promised and to unequivocally rescind the statements made by Mr. Williams. If this policy is allowed to stand, the clear message it will send to young minority men and women is that their options are limited and their higher education goals are a matter of indifference to this nation. Coming after so many years of trying to encourage broader and fairer access to a college education in America, as a matter of social justice and for our national economic well being, that would be a tragic outcome indeed.

In closing let me share with you remarks made by Lou Harris, to the College Board's National Forum two years ago: "By the end of the next decade, our country will have either succeeded or failed on the pivotal issue of how to open the doors of opportunity to minority young people. If we succeed in [making]...them creative, thinking workers, then surely we will have created a strongly competitive America that will be the envy of the world. But if we fail... that will condemn us to second tier economic status as a nation. Mark it well."

attachment

IKS/pbk
7/17g/7013g
03/18/91



The College Board

45 Columbus Avenue, New York, New York 10023-6992
(212) 713-8000

Dear Colleague:

The recent U.S. Department of Education statement about the legality of scholarships awarded to students on the basis of minority status has caused a great deal of discussion, speculation, and concern in the higher education community and the public media. Data from the College Board's Annual Survey of Colleges show a growing number of institutions offering such scholarships. However, there are few "hard" facts on numbers of these awards, dollar amounts, and sources of funds that can inform the current discussion. The College Board, in its role as information provider to both the educational community and the public, is undertaking the collection of these additional data.

On the 1990 Annual Survey of Colleges your institution indicated that you award some scholarship money on the basis of minority status, either exclusively or in conjunction with other factors such as need. The enclosed brief questionnaire is designed to gather more detailed information about these scholarships. Although you probably just recently completed this year's Annual Survey of Colleges and may have received one or more surveys on this specific topic, we hope that you will spend the additional time to supply this important supplementary data. As far as we know this survey is the only one which covers all segments of accredited higher education, and thus is able to provide a coherent national picture on this issue.

The data collected on this survey will be reported in aggregate form only. No institution will be identified with its specific data.

Enclosed is a self-addressed envelope for your convenience in returning the questionnaire, or you can send your survey using our fax number, (212) 713-8143. *Please return the survey by February 20.* If you have any questions or would like to discuss this matter before completing the survey, please contact me at (212) 713-8116.

Sincerely,

Jean Marzore
Director of Information Services

February 1991

Enclosure

cc: Office of the President

COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS BASED ON MINORITY STATUS

On the Annual Survey of Colleges, your institution indicated that you have at least one undergraduate grant or scholarship, funded or administered by your institution, for which minority status is used as a criterion in making the award decision. The following questions are designed to collect further information about these scholarships which are currently the focus of major public interest. We *will* not use any of these data in specific connection with your institution.

For the purpose of this survey, "minority" includes American Indian/Alaskan native, Asian American/Pacific Islander, black, and Hispanic. "Grants and scholarships" includes tuition remissions or waivers and gift aid funded from tuition revenues, other revenues, unrestricted and restricted gifts, endowment income, and federal, state, and local appropriations. It does *not* include awards for which your institution does not select recipients.

Please provide data from the 1989-90 academic year.

*The data that you and your colleagues provide on this survey will be used in aggregate form only.
Your institution will not be identified with its specific data.*

1. For grants/scholarships based on minority status *plus* need:
 - a) How many minority students received such awards? (7C) _____
 - b) What was the total dollar amount of these awards? (7D) \$ _____
 - c) What percent of this money came from:
 - Federal, state, or local government appropriations? (7E) _____%
 - Institutional funds (tuition and other revenues, endowment income, unrestricted gifts) that were designated for minorities by your institution? (7F) _____%
 - Restricted gifts that were designated for minorities by the original donor? (7G) _____%

2. For grants/scholarships based on minority status *without* regard to need:
 - a) How many minority students received such awards? (7H) _____
 - b) What was the total dollar amount of these awards? (7I) \$ _____
 - c) What percent of this money came from:
 - Federal, state, or local government appropriations? (7J) _____%
 - Institutional funds (tuition and other revenues, endowment income, unrestricted gifts) that were designated for minorities by your institution? (7K) _____%
 - Restricted gifts that were designated for minorities by the original donor? (7L) _____%

3. If any of the *non-need* minority-status scholarships (question 2 above) are based *exclusively* on minority status (without regard to any other criteria such as academics, leadership, etc.):

- a) How many minority students received such awards? (7M) _____
- b) What was the total dollar amount of these awards? (7N) \$ _____
- c) What percent of this money came from:
- Federal, state, or local government appropriations? (7P) _____%
 - Institutional funds (tuition and other revenues, endowment income, unrestricted gifts) that were designated for minorities by your institution? (7Q) _____%
 - Restricted gifts that were designated for minorities by the original donor? (7R) _____%

4. In order to put the information from the previous three questions in context, what was the total number of awards and dollar amount of institutionally funded or administered grants and scholarships provided by your institution to undergraduates in the 1989-90 academic year?

- a) Total number of grants/scholarship awards: (7S) _____
- b) Total dollar amount of these awards: (7T) \$ _____

Name and title of person completing survey:

Please return by February 20, 1991 to:

Jean Marzone
 Director, Information Services
 The College Board
 45 Columbus Avenue
 New York, NY 10023-6992
 Fax: (212) 713-8143



The College Board

1717 Massachusetts Avenue, N.W., Washington, D.C. 20036
(202) 332-7134

WASH. STATE OFFICE

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Institutions Reporting Grants/Scholarships Based on
Minority Status

	No. reporting grants/schol. based on min. status plus need	No. reporting Non need grants/schol. based on min., other crit. (acad., lead., etc.)	No. reporting grants/schol. based on min. status exclusively
Two-year			
Public	70 (65%)	56 (52%)	14 (13%)
Private	6 (86%)	1 (14%)	0 (0%)
Total	76 (67%)	57 (50%)	14 (12%)
Four-year			
Public	106 (62%)	128 (75%)	17 (10%)
Private	144 (76%)	95 (50%)	15 (8%)
Total	250 (69%)	223 (62%)	32 (9%)
TOTAL	326 (69%)	280 (59%)	46 (10%)

Note: percentages based on total respondents: 107 two-year public, 7 two-year private, 171 four-year public, 189 4-year private.



The College Board

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Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Numbers and Amount of Awards: Grants/Scholarships based on
Minority Status plus Need

	<u>Number of Awards</u>		<u>Amount of Awards</u>	
	<u>Total</u>	<u>Minority</u>	<u>Total</u>	<u>Minority</u>
Two-year				
Public	25,332	1,001 (4%)	\$ 19,366,570	\$ 613,262 (3%)
Private	410	18 (4%)	\$ 109,319	\$ 16,004 (15%)
Total	25,742	1,019 (4%)	\$ 19,475,889	\$ 629,266 (3%)
Four-year				
Public	255,416	9,493 (4%)	\$352,646,832	\$ 14,920,828 (4%)
Private	134,863	4,937 (4%)	\$387,043,418	\$ 17,815,840 (5%)
Total	390,299	14,430 (4%)	\$739,690,250	\$ 32,736,668 (4%)
TOTAL	416,041	15,449 (4%)	\$759,166,139	\$ 33,365,934 (4%)



The College Board

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Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Numbers and Amount of Awards: Non Need Grants/Scholarships based on
Minority Status and Other Criteria (academics, leadership, etc.)

	Number of Awards		Amount of Awards	
	Total	Minority	Total	Minority
Two-year				
Public	34,481	874 (3%)	\$ 24,385,655	\$ 1,199,744 (5%)
Private	0	0 (0%)	\$ 0	\$ 0 (0%)
Total	34,481	874 (3%)	\$ 24,385,655	\$ 1,199,744 (5%)
Four-year				
Public	274,514	9,244 (3%)	\$376,293,104	\$ 17,055,964 (5%)
Private	98,885	1,460 (1%)	\$300,734,725	\$ 5,644,402 (2%)
Total	373,399	10,704 (3%)	\$677,027,829	\$ 22,700,366 (3%)
TOTAL	407,880	11,578 (3%)	\$701,413,484	\$ 23,900,110 (3%)



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PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Numbers and Amount of Awards: Grants/Scholarships based on
Minority Status Exclusively

	Number of Awards		Amount of Awards	
	Total	Minority	Total	Minority
Two-year				
Public	34,481	385 (1%)	\$ 24,385,655	\$ 884,452 (4%)
Private	0	0 (0%)	\$ 0	\$ 0 (0%)
Total	34,481	385 (1%)	\$ 24,385,655	\$ 884,452 (4%)
Four-year				
Public	274,514	744 (0.3%)	\$376,293,104	\$ 1,053,990 (0.3%)
Private	98,885	57 (0.1%)	\$300,734,725	\$ 95,612 (0.03%)
Total	373,399	801 (0.2%)	\$677,027,829	\$ 1,149,602 (0.2%)
TOTAL	407,880	1,186 (0.3%)	\$701,413,484	\$ 2,034,054 (0.3%)



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Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Sources of Awards: Grants/Scholarships based on
Minority Status plus Need

	Average percent of awards coming from*		
	Public funds	Inst. funds	Restricted gifts
Two-year			
Public	30%	25%	41%
Private	50%	13%	36%
All two-yr	32%	24%	41%
Four-year			
Public	39%	32%	27%
Private	10%	49%	40%
All four-yr	22%	42%	35%
TOTAL	24%	38%	36%

*Percents may not add to 100% because of rounding.



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Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Sources of Awards: Non-Need Grants/Scholarships based on
Minority Status and Other Criteria (academics, leadership, etc.)

	Average percent of awards coming from*		
	Public funds	Inst. funds	Restricted gifts
Two-year			
Public	27%	42%	29%
Private	0%	0%	100%
All two-yr	27%	12%	30%
Four-year			
Public	23%	58%	15%
Private	3%	78%	17%
All four-yr	14%	67%	16%
TOTAL	17%	61%	19%

*Percents may not add to 100% because of rounding.



The College Board

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Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Sources of Awards: Grants/Scholarships based on
Minority Status without Regard to Need

	Average percent of awards coming from*		
	Public funds	Inst. funds	Restricted gifts
Two-year			
Public	27%	42%	29%
Private	0%	0%	100%
All two-yr	27%	12%	30%
Four-year			
Public	23%	58%	15%
Private	3%	78%	17%
All four-yr	14%	67%	16%
TOTAL	17%	61%	19%

*Percents may not add to 100% because of rounding.



The College Board

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(202) 755-7734

Washington Office

PRELIMINARY ANALYSIS OF COLLEGE BOARD SURVEY ON GRANTS/SCHOLARSHIPS
BASED ON MINORITY STATUS
AS OF 3/15/91

Sources of Awards: Grants/Scholarships based on
Minority Status Exclusively

	Average percent of awards coming from*		
	Public funds	Inst. funds	Restricted gifts
Two-year			
Public	45%	19%	28%
Private	0%	0%	0%
All two-yr	45%	19%	28%
Four-year			
Public	17%	53%	27%
Private	6%	63%	23%
All four-yr	12%	58%	25%
TOTAL	22%	46%	26%

*Percents may not add to 100% because of rounding.

Mr. WEISS. Thank you, Mr. Gladieux.

Mr. Sanders.

Mr. SANDERS. No questions.

Mr. WEISS. I think that this is really outstanding testimony, and I very much appreciate your coming before us to give your insights as to where we actually are. There is a suggestion, over the course of these past few days, that if, in fact, we held this hearing, we would be sending the wrong signals. And I think that your testimony has indicated the proper signal to send.

And hopefully, as I said earlier, the Secretary, upon reviewing your testimony and upon reviewing the testimony of Mr. Williams, and, hopefully, having some conversations with some other people in the Department, will conclude that before he came on as Secretary, things took place in the Department that should have not have. And as I say, if there is no problem, the problem is when you try to fix it. Thank you very much for your participation.

Let me, for the record, Mr. Hobson has indicated that he wanted to vote no, by proxy.

The subcommittee will stand in recess until 3 p.m. on Thursday, March 21, or until such other time as the Chair shall announce. The subcommittee now stands in recess.

[Whereupon, at 12:40 p.m., the subcommittee adjourned, to reconvene at 3 p.m. Thursday, March 21, 1991.]

DEPARTMENT OF EDUCATION'S RACE-SPECIFIC SCHOLARSHIP POLICY

THURSDAY, MARCH 21, 1991

HOUSE OF REPRESENTATIVES,
HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 3 p.m., in room 2203, Rayburn House Office Building, Hon. Ted Weiss (chairman of the subcommittee) presiding.

Present: Representatives Ted Weiss, Donald M. Payne, Craig Thomas, William H. Zeff, Jr., and David L. Hobson.

Also present: James Gottlieb, staff director; Marc Smolonsky, professional staff member; Mitchell Zeller, associate counsel; Ann Marie Atkins, staff assistant; and Stephen D. McMillan, minority professional staff, Committee on Government Operations.

Mr. WEISS. Today the subcommittee continues its hearing that began yesterday, on race-based scholarships. Because one of the witnesses requested by the subcommittee refused to appear, the subcommittee authorized a subpoena to compel his testimony. Last night I was informed that the Department had decided to allow Richard Komer, the Deputy Assistant Secretary for Policy, to appear today.

Before we begin, I want it to be clear that there would have been no need for yesterday's subpoena vote or today's session had the Department cooperated with the subcommittee. Every step in our review has been met with intransigence. When I originally requested documents related to minority scholarship program, the Department withheld most of the key information, and then, only provided it under the Federal subpoena.

When subcommittee staff asked to interview OCR employees involved with minority scholarships, those requests were refused. And when we requested the appearance of Richard Komer, Deputy Assistant Secretary for Policy, he refused to appear. I am pleased that we can now proceed. Mr. Komer, welcome.

Before we start, Mr. Williams, you're still under oath. Mr. Komer, will you stand?

[Witness sworn.]

Mr. WEISS. Thank you. Mr. Williams, did you make any attempts to clear the minority scholarship policy through the White House, prior to sending the letter to the Fiesta Bowl?

(75)

STATEMENT OF MICHAEL L. WILLIAMS, ASSISTANT SECRETARY
FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, ACCOMPANIED BY RICHARD KONER, DEPUTY ASSISTANT SECRETARY
FOR POLICY—Continued

Mr. WILLIAMS. No, I did not.

Mr. WEISS. Will you pull the microphone just a little bit closer to you? It's not very sensitive. Mr. Williams, sometime after the Fiesta Bowl decision became a matter of public record, did you address the OCR staff, in the auditorium of Federal Office Building No. 6, about the issue of minority scholarships and the controversy surrounding the Fiesta Bowl decision?

Mr. WILLIAMS. Mr. Chairman, I think I addressed the OCR staff on the day of the announcement of the National Enforcement Strategy, which was December 11, and mentioned the issue with regard to the Fiesta Bowl, but I do not recall holding a meeting specifically with OCR staff regarding the Fiesta Bowl.

Mr. WEISS. Did you announce, during that meeting, in sum or substance, that you had received a telephone call from the most important person in the country, and that you had that person's support for the Fiesta Bowl decision?

Mr. WILLIAMS. That was a telephone call that, I think, a number of people are now aware of. The President called me after December 12 to express, in a very, very short conversation, basically say, "Just hang in there, everything will be all right." And I called a meeting with my staff to advise the staff of that telephone call.

The conversation between the President and myself was not about the Fiesta Bowl letter; it was not a way of expressing his position, one way or another, on the letter. He was calling, basically, to say, "I know there's probably a lot of heat; everything will be all right. Just hang in there."

Mr. WEISS. During yesterday's hearing, you stated that it was your position that the *Bakke* decision was not limited to admissions, but was also extended to financial aid. Following the *Bakke* decision, OCR issued an number of opinions that the ruling did not apply to financial aid cases. Let me quote two of these.

We do not consider it proper to extend the *Bakke* decision from admissions policies to all race-conscious actions by universities. Admissions quotas, the policy at issue, and *Bakke*, unlike many other policies, may result in the exclusion of an individual from a university on the base of race or national origin. The availability of a particular financial aid program does not have such a far-reaching affect.

And in another case:

We do not believe that *Bakke* is controlling as to the award of student financial aid, as a decision that addresses relating only to admissions.

Now, Mr. Williams, at what point in time did the Department change this policy?

Mr. WILLIAMS. Mr. Chairman, you have read from two documents, one, if I could, just for the record, is a 1982 document regarding MIT, and the second reading that you made was from 1983, the University of Denver.

To answer your question, if I could call your attention to a document that we have provided for you, which as I mentioned yesterday, was in 1986. It is a document that is—the signature on it is Alicia Corro, who was the Acting Assistant Secretary for Civil

Rights. The document is dated May 2, 1986. On the second page, in the next to last paragraph on that page, it says:

Any determination with respect to the legality of the scholarship program mentioned in your letter would take into consideration the title VI law regulation, the *Bakke* case, and other relevant case law.

That is one matter that is——

Mr. WEISS. That's it?

Mr. WILLIAMS. That is subsequent——

Mr. WEISS. Where does that, in any way at all, indicate that financial assistance programs were now going to be subject to the *Bakke* decision?

Mr. WILLIAMS. That is the determination and the expression that *Bakke* applies to addressing the question of a scholarship that was being designed for Dutch Americans.

Mr. WEISS. Well, you're stretching. But did you publish the change of policy in the Federal Register, as required by law?

Mr. WILLIAMS. As I mentioned yesterday, to you, Congressman Weiss, this was not a change of—are you talking about—which change are you suggesting occurred, this one in 1986?

Mr. WEISS. We have a very clear statement that says, in March 22, 1983, "We do not believe that *Bakke* is controlling," this is a memorandum within the U.S. Department of Education. It says, "We do not believe that *Bakke* is controlling as to the award of student financial aid as the decision addresses issues relating only to admissions."

Now, you say that, sometime in 1986, you had a different position than that, and that's a change in policy. And the question that I have is: Did you, in fact, publish that change of policy in the Federal Register, as required by law?

Mr. WILLIAMS. First of all, let me remind you, if I could, Congressman, I was not at OCR in 1986.

Mr. WEISS. Did the Department publish that, as required by law?

Mr. WILLIAMS. I am not aware if the Department did or not, Congressman, but let me——

Mr. WEISS. You haven't inquired, you haven't checked?

Mr. WILLIAMS. Let me suggest to you that that is an interpretation of the law, and it's my understanding that policy interpretations need not——

Mr. WEISS. Your understanding happens to be wrong. Mr. Komer, are you the Deputy Assistant Secretary for Policy in the Office for Civil Rights at the Department of Education?

Mr. KOMER. Yes, I am.

Mr. WEISS. Are you aware that Congress has the constitutional authority and responsibility to oversee the executive branch of government?

Mr. KOMER. Yes, I am.

Mr. WEISS. Do you believe that you are, somehow, personally above the law that authorizes Congress to review the policies and procedures of the Department of Education?

Mr. KOMER. No, I don't.

Mr. WEISS. Were you instructed not to appear at yesterday's hearing.

Mr. KOMER. The decision in the Department was that Michael Williams would appear.

Mr. WEISS. Were you instructed not to appear?

Mr. KOMER. Yes.

Mr. WEISS. By whom?

Mr. KOMER. The decision that I not appear was communicated to me by Assistant Secretary Williams.

Mr. WEISS. Mr. Williams, why did you instruct Mr. Komer not to appear?

Mr. WILLIAMS. The Department had made a decision that in the Department's reading, the inquiry dealt with the Fiesta Bowl letter of December 4; that I am the Assistant Secretary, I am ultimately responsible for the activity of that office, and that I would represent the office in these proceedings.

Mr. WEISS. Did you discuss your decision, to instruct Mr. Komer not to appear, with anyone else in the Department?

Mr. WILLIAMS. The Department made a decision about—

Mr. WEISS. Who in the Department made the decision?

Mr. WILLIAMS. Officials in the Department made that decision.

Mr. WEISS. Who? Who conveyed it to you?

Mr. WILLIAMS. There were a number of people involved in it.

Mr. WEISS. Who?

Mr. WILLIAMS. The people involved in the decision were myself, if I can recall, myself, the Deputy Secretary, and a few others.

Mr. WEISS. Who is the Deputy Secretary?

Mr. WILLIAMS. Ted Sanders.

Mr. WEISS. And who else? Who were the few others?

Mr. WILLIAMS. There would have been other staff people, and, quite frankly, I do not recall the other staff people that were there.

Mr. WEISS. So then, it was Mr. Sanders—

Mr. WILLIAMS. It was a meeting that we were having, that a number of people walked in and out of the meeting.

Mr. WEISS. It was a casual kind of a discussion that you would instruct Mr. Komer not to appear before the subcommittee?

Mr. WILLIAMS. There was no instruction to me to instruct. There was not a casual meeting, there were a number of people that were there to discuss various parts of the hearing, and the issue of me appearing was one of those issues, during that meeting.

Mr. WEISS. For a long time, we had a difficult time getting you to appear before congressional committees. Who made that decision to withhold you, or try to withhold you from appearing before this and other congressional committees?

Mr. WILLIAMS. I do not recall anyone ever attempting to withhold me from appearing at this committee. With regards to my appearance on December 19, if I could, the Department received an invitation for me to appear at a hearing on December 19 to discuss the position that was taken in the Fiesta Bowl letter of December 4.

As you are aware, on December 18, there was an announcement with regards to a position. The Department took the position that we had addressed the December 4 issue, and there had not been an acceptance. The Department said it had not accepted to discuss December 18, and that's why I was not there.

Mr. WEISS. You are not aware of the fact that the Department of Education, from the very top, has attempted to have this committee not have your presence at its hearing?

Mr. WILLIAMS. I am aware that the Department has communicated to you and has requested an explanation as to why, since the Secretary is now going about the process of trying to do a review of this issue, why it was continually necessary to have this hearing; I am aware of that, yes.

Mr. WEISS. And that, in fact, there was an indication that you would not appear?

Mr. WILLIAMS. I am not aware that that has ever been communicated to you or anyone else. I am here. I am ready and willing and able to continue with answering—

Mr. WEISS. In any event, it was Mr. Sanders—what's Mr. Sanders' position?

Mr. WILLIAMS. I said, during the course of that meeting, there was a discussion as to whether I should come, in the sense of explaining that I am the person that's responsible for that office; that was the position of the Department.

Mr. WEISS. It was Mr. Sanders who told you that Mr. Komer should not come; is that right?

Mr. WILLIAMS. What I am saying to you is that the Department made the decision that I am the person that's responsible—

Mr. WEISS. The Department is not a body with a voice; people in the Department have voices.

Mr. WILLIAMS. There was no one person that said, "He's not going." I'm sorry, that's the best I can do for you, Congressman.

Mr. WEISS. For these last 2 days we've been struggling over whether, in fact, Mr. Komer would be here under subpoena or whether he would be here by invitation. You're telling me that nobody had, in fact, said that Mr. Komer is not coming and then, finally decided that Mr. Komer is coming?

Mr. WILLIAMS. What I am saying, Congressman, is that the decision in the review, in the position of the Department, is that I am the person that's responsible for that office, and that I am the person who signed the December 4 letter, and that I am the person who is aware of the legal interpretation, who participated in the legal interpretation on December 4, and that I can speak for that office. That's what—

Mr. WEISS. Unfortunately, the Constitution of the United States confers upon Congress the prerogative of determining which Federal employees it will hear from. You agree with that, do you not?

Mr. WILLIAMS. You're telling me that, Congressman.

Mr. WEISS. You've never heard that principle?

Mr. WILLIAMS. I have no reason to disagree.

Mr. WEISS. Thank you. Mr. Komer, what are your responsibilities as Deputy Assistant Secretary?

Mr. KOMER. Actually, at the present time, I am both Deputy Assistant Secretary for Policy, and Acting Deputy Assistant Secretary for Operations. So I oversee the day-to-day operations of, basically, all the headquarters and field components of OCR, at the instruction of Assistant Secretary Williams.

Mr. WEISS. And how long have you worked for the Office for Civil Rights?

Mr. KOMER. This most recent time, I have been employed at the Office for Civil Rights since April 9, 1990.

Mr. WEISS. Had you been employed at a previous time?

Mr. KOMER. Yes, I have.

Mr. WEISS. When was that?

Mr. KOMER. From the formation of the Department of Education out of the Department of HEW, where I was in the Office of General Counsel, Civil Rights Division. I went with the Department of Education when it was formed in 1980, and stayed there until late 1982.

Mr. WEISS. How long had you been with HEW, prior to that?

Mr. KOMER. Since September 1978.

Mr. WEISS. And, also in the field of civil rights?

Mr. KOMER. I was in the Civil Rights Division of the Office of General Counsel. In HEW, OCR did not have its own legal staff. There was a division of the Office of General Counsel that provided legal support to OCR.

Mr. WEISS. What did you do before that?

Mr. KOMER. That's when I graduated from law school and took the bar exam and came to work.

Mr. WEISS. So then, your service has been, throughout, with the Department of Education or its predecessors.

Mr. KOMER. No, it hasn't. I left the Department of Education and its predecessor in November 1982, to go to the Civil Rights Division at the U.S. Department of Justice, where I stayed until January 1985, when I left to go to the U.S. Equal Employment Opportunity Commission, where I stayed until April 9, 1990, at which point, I took a political SES position at the Department of Education, giving up my career SES position.

Mr. WEISS. You have a continuing civil rights employment record, from the very beginning of your career in government service.

Mr. KOMER. Yes.

Mr. WEISS. On May 1, 1990, you sent a memorandum to the civil rights director in region 4, suggesting that Florida Atlantic University be investigated as part of compliance review. Do you recall that memorandum, Mr. Komer?

Mr. KOMER. Yes, I do, but that's not an accurate description of what the memo said. I sent a memo to him requesting him to consider opening a compliance review there, on the basis of the article that had been in the Washington Post, on March 9, 1990. However, that package had been started several weeks before I even reached the Office for Civil Rights from EEOC.

It was something that was in the works, that showed up on my desk in late April. I did not initiate that memo, as in reading the article and telling the staff to do it.

The staff had a policy under development at the time that they saw this article in the Washington Post. And they, as is not unusual, sent up a memo, through channels, for the Deputy Assistant Secretary to alert the region to a potential civil rights violation in their region, and to add it to their list of possible topics for compliance reviews. That's the memo I signed on May 1.

Mr. WEISS. What policy was under development, and who was developing it?

Mr. KOMER. Policies in the Office for Civil Rights are developed by a component called the "Policy and Enforcement Service," which reports to me, in my capacity as Deputy Assistant Secretary for Policy.

There is a policy division within that Service. That policy division had created a policy agenda before I had arrived, considerably before I had arrived. In fact, the issue of race-specific scholarships was on that policy agenda long before I arrived, and was, in fact, as far as we can tell, first suggested by our region 7, Kansas City office, in December 1988.

Mr. WEISS. The memo that we have, the May 1, 1990, memo from you to the region 4 civil rights director, focuses, not on any policy being developed in the office, but on the Washington Post article. It starts off, a very brief memo, "Attached, for your information, is a Washington Post article that describes a scholarship plan instituted by Florida Atlantic University." And then it closes saying they wish to consider the Florida University plan when planning future compliance reviews.

If, in fact, what you were doing was conveying, or the policy planning unit was conveying a policy plan concern that has long been in development, why focus on the Washington Post article?

Mr. KOMER. Why focus on the Washington Post article when it described a scholarship of the precise type that we were developing a policy to address? I think the answer is obvious. The region knew that we were developing policy on this topic in Washington. It was discussed during a conference call with them, July 19, 1989, some 9 months before I even came back to OCR.

The topic of the conference call was the Supreme Court's recent decision in *City of Richmond v. Croson*. In the course of that conference call, which was held with all of the regional directors of our 10 regions, and the 10 chief regional civil rights attorneys, questions were raised about the effect of *Croson* on race-specific scholarships. And it was discussed, at that time, that there was policy in process.

In September 1989, a policy agenda was distributed, including financial aid as a priority issue. It was then discussed with the RD's, the regional directors, in Washington in October 1989, during the yearly round table. So, the entire agency knew that this was an issue, well before Michael arrived or I arrived, on which policy was being developed.

Mr. WEISS. If policy was being developed—and I assume that it was announced when Mr. Williams, on December 4, wrote his letter, and certainly, on his following clarifications on the 11th and on December 18. Was there, at any time, any setting forth in the Federal Register of this proposed policy change?

Mr. KOMER. We have never been required or announced any policy change involving this in the Federal Register. We do not have an existing policy that has been published in the Federal Register. We have not proposed any change to our existing regulations, nor do we consider anything that Mr. Williams said on December 4 or December 18 as being inconsistent with the existing regulations and the interpretation published in the Federal Register, after the *Bakke* decision, in 1979.

Mr. WEISS. Let me quote to you from a notice in the Federal Register, dated Monday, May 1, 1978, "The Office for Civil Rights," this is under Department of Health, Education, and Welfare, Office of the Secretary, nondiscrimination and federally assisted programs policy determinations, introduction:

The Office for Civil Rights will hereafter publish all major policy determinations in the Federal Register and systematically provide copies to organizations representing beneficiaries and recipients of Federal financial assistance. Policy determinations will fall into one of three categories: One, policy interpretations will clarify and explain regulatory provisions; two, procedural announcements will outline the specific procedures recipients must follow to comply with regulatory provisions, or the procedures this office will follow to obtain compliance; three, decision announcement will illustrate how this office has applied regulatory provisions to specific fact patterns developed through investigations.

And it goes on to cite five policy determinations issued in accordance with this procedure.

So how can you say that you've not been required to, in fact, set forth any policy determinations, changes, in the Federal Register?

Mr. KOMER. Policy decisions by the Secretary of HEW, to publish HEW policy in the Federal Register are not, in my view, binding on the Secretary of Education. After the Department of Education was formed in 1980, to the best of my knowledge, no Secretary of Education has published such a notice saying that the Office for Civil Rights would only issue policy through publication in the Federal Register.

Mr. WEISS. So if, in fact, the Department of Education had remained in HEW, then you would have been bound, but now you're not.

Mr. KOMER. There may well be something else in the Department that binds us to publish something in the Federal Register—

Mr. WEISS. How about the Administrative Procedures Act, which sets forth what you have to do?

Mr. KOMER. I disagree with your reading of the Administrative Procedures Act. I do not believe that policy interpretations that do not amend existing regulations, and certainly, in this case, do not amend an existing policy interpretation, have to be published in the Federal Register.

Mr. WEISS. Well, I guess if you conclude that the laws don't apply to you, well, the rules don't apply to you, then you can do whatever you like.

Mr. KOMER. That is not what I have concluded.

Mr. WEISS. Was Florida Atlantic University a subject of inquiry by that policy development group that had been working on developing policy before your arrival?

Mr. KOMER. Only to the extent that the same group that was assigned the task of developing the policy was the one that generated the memo that I signed when I arrived, that requested them to consider a compliance review there.

Mr. WEISS. I'm not sure that I get that. Specifically, was Florida Atlantic brought to your attention only by that Washington Post article?

Mr. KOMER. Yes.

Mr. WEISS. But prior to that, the general issue was being considered by this policy development group; is that—

Mr. KOMER. I believe that's correct.

Mr. WEISS. I cite you the Administrative Procedures Act's definition of a rule. Under section 2C, a rule is defined as, "The whole, or a part, of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, or describing the organization, procedure, or practice requirements of an agency."

Would you deny that, in fact, the Department of Education comes under the ambit of the Administrative Procedures Act?

Mr. KOMER. We certainly come under the ambit of the Administrative Procedures Act.

Mr. WEISS. Then how do you get out from under the provision that I just quoted?

Mr. KOMER. We publish our rules and regulation under notice and comment procedures, under the Administrative Procedures Act.

Mr. WEISS. How about interpretation?

Mr. KOMER. We interpret our regulations, however, we do not have to publish those in the Federal Register.

Mr. WEISS. Again, let me cite you, the word designed to "implement, interpret"; it says "interpret," now how do you get out of that? How do you deny that word being in that particular section?

Mr. KOMER. Regulations can interpret laws; policies can interpret regulations.

Mr. WEISS. Hello?

Mr. KOMER. We publish our rules and regulations which, under title VI, have the force and effect of a law, and which are signed by the Secretary and by the Attorney General, pursuant to title VI. Those must be published in the Federal Register, and, in fact, all of the rules and regulations that we use have been so published.

However, we do have policies which interpret parts of the rules that we have published under the APA. And we are not required to publish every policy interpretation in the Federal Register, under the APA.

Mr. WEISS. Well, I must tell you that's a novel interpretation of the Administrative Procedures Act. It seems to me to be clear on it's face; it uses the word "interpret." Did your December 4 policy statement on minority scholarships change the way that the Department interpreted and enforced its title VI rule?

Mr. KOMER. December 4 was a letter to the Fiesta Bowl sent by Assistant Secretary Williams. It was not intended to be an announcement of policy.

Mr. WEISS. Well, whatever it was intended to be, that's the way that it was, in fact, taken, right?

Mr. KOMER. It may have been taken that way, but I'm afraid that this situation proves that how you want something to be taken is not how it will be taken.

Mr. WEISS. On December 18, the Department issued a release, and it says in its headline, "Department Issues Policy Statement on Race-exclusive Scholarship." And it goes on to say in its very first sentence, "The U.S. Department of Education, today, announced a six-point administrative policy regarding race-exclusive scholarships, to prevent disruptions to the efforts of colleges and

universities," then it goes on further. Was that published in the Federal Register for comment?

Mr. KOMER. No, it was not.

Mr. WEISS. Should it have been?

Mr. KOMER. No, I don't think so.

Mr. WEISS. Tell me why not.

Mr. KOMER. Because it was an interpretation of the regulations.

Mr. WEISS. But now, this was not somebody else who could misunderstand a letter to the Fiesta Bowl promoters; this was the Department of Education saying—headline on a—news release, "Here it comes folks: policy statement," and then says, "there's a six-point policy change that we're coming at you with." How can you deny that this was, in fact, a policy determination?

Mr. KOMER. I don't believe that I would deny that it is a policy interpretation.

Mr. WEISS. Then, in fact, it should have been printed for comment, according to the procedures of the Administrative Procedures Act.

Mr. KOMER. Sir, that just takes us back to where we were before, which is—

Mr. WEISS. No, it doesn't. It takes us to the point that, in fact, the Department of Education, through your efforts and Mr. Williams' efforts, has decided that it can, in fact, rewrite the rules and regulations under which all Federal agencies are required to operate, and decided that the Department of Education can operate differently. That's not for you to do, that's perhaps for Congress to do, if it wants to elevate the Department to that level, but we haven't done that yet.

Was Florida Atlantic University the first school in this country to offer minority scholarships?

Mr. KOMER. I have no way of knowing.

Mr. WEISS. Why did you choose that particular time to investigate that particular university when, probably, thousands of institutions offer race-specific scholarships, and had been for decades?

Mr. KOMER. Mr. Chairman, I repeat, if you would read the May 1 memo that I signed and which was in the works before I arrived at the Department of Education, it tells region 4 to consider starting a compliance review at Florida Atlantic. If I had wanted to start an investigation at Florida Atlantic, I would have told them to start a compliance review; that's not what I told them.

Mr. WEISS. You told them to consider it.

Mr. KOMER. Right. We do not have the resources to investigate on our own initiative, which is a compliance review, every possible violation of title VI. But we do, in fact, try and collect any information that we receive from various sources, including people who may testify before Congress, any information indicating possible title VI, title IX, section 504, or Age Discrimination Act noncompliance, and we alert our regional offices to that fact.

And, particularly, when we have information relating to topics which are on our policy agenda, I think it's a wise decision to let them know what's out there. In point of fact, we did not initiate a compliance review with respect to Florida Atlantic University. We were overtaken by the receipt of complaints against Florida Atlantic.

Mr. WEISS. You've told us about your background, and you are wise in the ways of bureaucracy. When a regional office receives a communication from headquarters, such as this one of May 1, 1990, which sets forth what the problem is, and then closes with the suggestion that "you may wish to consider Florida Atlantic University when planning future compliance reviews," what is the normal and accepted reaction from the people at the regional office?

Mr. KOMER. That they would put it in the folder with the other information they have and consider it. And they would know that if they didn't select it, they might, in fact, be questioned by me or by the Policy and Enforcement Service, who had generated the memo.

However, you're perhaps unaware that at the time I sent that memo, the entire Office for Civil Rights was under a travel freeze for any purposes other than complaint investigations. So I was well aware, in sending that memo, that unless the regional director in Atlanta came back to me and said, "Dick, do you really mean that I'm supposed to go down there and do a compliance review from Atlanta? You're going to make an exception to the travel freeze?" He did not ask that, and I wouldn't have expected him to.

Mr. WEISS. Prior to May 1, the date of your memorandum, had OCR received a complaint of discrimination regarding Florida Atlantic University?

Mr. KOMER. No.

Mr. WEISS. Why did you request that region 4 conduct a compliance review rather than an investigation?

Mr. KOMER. A compliance review is an investigation, and I did not request them to conduct an investigation. I requested them to consider them, Florida Atlantic University, as a potential compliance review investigation site.

Mr. WEISS. Wait, let me acknowledge that you said "consider." You say that there's no difference between a compliance review and an investigation?

Mr. KOMER. A compliance review is an investigation. A complaint investigation is an investigation. We do two kinds of investigations.

Mr. WEISS. Yes. And why did you request a compliance review investigation, or ask them to consider a compliance review investigation rather than a complaint investigation?

Mr. KOMER. Complaint investigations, for us, are mandatory. If we get a complaint, we must investigate, under our regulations. Compliance reviews, several hundred of which we do in a good year, are a use of our discretionary resources to go after situations where we think there is a potential for a violation of one of our statutes, but we do not have a complaint.

Mr. WEISS. So then, as of May 1, you had no complaint.

Mr. KOMER. As of May 1, we had no complaint.

Mr. WEISS. OK. Did you have any discussions with anyone at the Washington Legal Foundation, about using title VI to ban race-specific scholarships.

Mr. KOMER. None whatsoever.

Mr. WEISS. Now, the Department received a formal complaint about Florida Atlantic University from the Washington Legal Foundation. The complaint alleged that Florida Atlantic Universi-

ty was violating civil rights law by providing race-specific scholarships. Did you or, to your knowledge, anyone else at the Department of Education, discuss this complaint with anyone at the legal foundation, before it was received?

Mr. KOMER. No, I did not.

Mr. WEISS. Do you know if anyone else at your Department had any such conversation?

Mr. KOMER. No, I do not.

Mr. WEISS. Have you, in fact, inquired in discussions with members of that policy development group if they had discussions with the Washington Legal Foundation?

Mr. KOMER. No, I haven't. I had no reason to.

Mr. WEISS. So then, you cannot, of your own knowledge, state whether, in fact, they did or did not have any discussions with the Washington Legal Foundation?

Mr. KOMER. It's certainly possible.

Mr. WEISS. Did you discuss the complaint with anyone connected to the Washington Legal Foundation, after receiving it?

Mr. KOMER. No. I have never talked to anybody at the Washington Legal Foundation.

Mr. WEISS. Did anyone from the Department of Education discuss the complaint, after you received it, with the Washington Legal Foundation?

Mr. KOMER. I don't know.

Mr. WEISS. They could have; is that possible?

Mr. KOMER. There are 800 employees in the Office for Civil Rights. I would not be surprised if the Atlanta office personnel contacted the Washington Legal Foundation, as we normally would when we receive a complaint and forward it to the appropriate regional office for investigation. It is our standard operating procedure to contact the complainant.

Mr. WEISS. Let me stop at this point, because I've taken a great deal of time, and yield to Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman. I am not quite certain where we're going, frankly, with this hearing, so let me review just a little bit. I didn't, yesterday, take much time, but I had thought, in the beginning that we were talking about the policy that was annunciated in the December 4 letter. It's my understanding, from Mr. Williams, yesterday, that there was no policy annunciated there.

And then, I thought we were moving as to why a policy had been made, and, of course, if there was not a policy, that became a little difficult to pursue. So we turned, then, to process, as to whether the process was followed. Again, a little difficult if, indeed, there hasn't been a policy change.

And then it seemed that we moved, and the press picked up on the notion that somebody else was calling the shots in the office, so that we must have someone else here today, because Mr. Williams was apparently not in charge. So, we need to talk about that a little.

And then, of course, on top of all that, regardless of all these things that had happened, the Secretary announced, yesterday, that this issue will be revisited and visited over a period of time to establish a policy. So where I am makes it a little hard. Was there

a change, Mr. Komer, in the policy, as a result of the letter of December 4?

Mr. KOMER. We were in the process of developing a policy, because, I think, it was recognized by all of us, including the Assistant Secretary, that we had never articulated a policy on minority scholarships. As a result, we had inconsistent outcomes in the letters that we had issued over the years; pre-*Bakke*, post-*Bakke*. We have made regulatory changes over the years that affect this issue, yet we have never addressed this precise issue in any clear policy document.

The nearest we've come is in a policy document issued in 1979, after *Bakke*, where we said, and I quote, if I can find it—

Mr. THOMAS. You can paraphrase it, if you like.

Mr. WEISS. Very hard.

Mr. KOMER. I apologize for this. I'm looking at the vocational education guidelines, which we published in the Federal Register, and which are appendix—

Mr. WEISS. Are you looking for the one on October 10, 1979?

Mr. KOMER. I believe so.

Mr. WEISS. Would you like our copy?

Mr. KOMER. I think I have it in my book. In any case, we pretty clearly said that, except in the situation where one is remedying past discrimination, one may not designate scholarships by race. That is a rough paraphrase of what I think this said.

Mr. THOMAS. On that basis, were you satisfied that the process, whatever process was done, was appropriate? In retrospect, were you to go through this process again—

Mr. KOMER. I believe what we have done has been clearly legal, within the law, in terms of the Administrative Procedures Act. I don't believe it was the optimal process that we could have followed. I was not in favor of the Department, or the Office for Civil Rights issuing a press release and a letter to the Fiesta Bowl. But, I am not the Assistant Secretary for Civil Rights, Mr. Williams is.

Mr. THOMAS. Who made that decision to release the letter to the Fiesta Bowl?

Mr. KOMER. Mr. Williams.

Mr. THOMAS. So Mr. Williams is apparently in charge of the office.

Mr. KOMER. Yes, he is, unquestionably so.

Mr. THOMAS. You have been involved, for some time, in various offices. Do you think there are circumstances under which race-exclusive scholarships are appropriate?

Mr. KOMER. If you're asking my opinion, yes, I certainly do.

Mr. THOMAS. Under the law?

Mr. KOMER. Under the law.

Mr. THOMAS. So you would not be opposed to that notion, under the legal circumstances, as you view them; is that right?

Mr. KOMER. There are certain areas where I don't think there is any dispute between us and anyone else, particularly those instances that fall under our regulations 34 CFR section 100.3(B)(6)(i), where an institution has discriminated in the past, the regulations, appropriately under the law, clearly require remedial affirmative action to overcome the effects of discrimination. And we have ac-

cepted remedies, in the past, that involve race-specific scholarships as a remedy for discrimination that we have found.

Mr. THOMAS. Mr. Williams, how long have you been there? Since the summer?

Mr. WILLIAMS. July 6, 1990.

Mr. THOMAS. And Mr. Komer?

Mr. KOMER. Since April 9, 1990.

Mr. THOMAS. Were you surprised that the tone of the reports yesterday, that really maybe somebody else was behind the letter?

Mr. WILLIAMS. I am surprised, but I probably am more offended, to be honest with you. But yes, I am surprised by the tone. I am surprised by the reporting, but I can understand the reporting, because that was the implication at which we left this hearing, yesterday. But I am more offended by it, than anything else.

Mr. THOMAS. Why are you offended?

Mr. WILLIAMS. I'm offended by it because, No. 1, I come to this agency with having had a civil rights enforcement background. I come to this agency, I guess, at some disadvantage; I have not written about civil rights, nor have I given a lot of speeches, I guess, about civil rights, even though, I have given some. I have not done a lot of studying in the area, but I have done one thing in the area that, maybe, one of our former justices had mentioned, he said that, "one of the greatest civil rights is the right to be left alone," and I've been involved in that.

I was a prosecutor for 4 years at the Department of Justice in the Criminal Section of Civil Rights Division. I was in Alabama because I had successfully prosecuted a Valley Station police officer for beating six of his arrestees. I was also in Arizona, because, in Arizona, I successfully prosecuted a deputy sheriff that had taken a juvenile, who was handcuffed behind his back, and asked him a question, didn't get the answer he wanted, and took a 23 inch metal flashlight and hit him upside his head.

I left there and I went to Indiana. And in Indiana, I successfully prosecuted a "good ol' boy" that ran a black Federal agricultural worker out of a local tavern at gunpoint. I left there, and I went to Idaho. And in Idaho, there was a neo-Nazi that had taken upon himself to say that he was going to run black and interracial families out of a local community, and I successfully prosecuted him, as well.

I went down to Kentucky. And in Kentucky, I prosecuted a Klansman that took the home of a black female and her two kids and burned that house to the ground the second day that they were there. And then I left there, and went to North Carolina, where there was a black prison guard who wanted to take a sergeant's exam, and a white prison guard didn't want him to do it and threatened him from taking the sergeant's exam at gunpoint. Those people were successfully prosecuted, as well.

And I went to North Carolina, and stayed in North Carolina over the course of 2 years, and in North Carolina, prosecuted members of the Carolina Knights, of the Ku Klux Klan. And when we were through, those individuals that had attempted to obtain stolen military weapons, seven of them were successfully prosecuted.

And so, in the course of 4 years, there were 17 folks that had committed racial crimes, and 12 of them had spent some period of

time in a Federal institution. And the reason that they were in that Federal institution, I know a little bit about it because I put them there.

To suggest, in some kind of way, when I came to DOJ, that the kind of commitment that had been expressed at DOJ was not expressed here, at the Department of Education, offends me, because the principle is the same. It is that it is fundamentally incorrect, improper, to have race, outside of the confines that the law has provided, to be the determining factor in whether people benefit, or not, in this society.

That is the same principle that I used in the performance of my responsibilities at DOJ. It is the same principle that guides my behavior at the Department of Education. And, in this matter, that is the principle that guided the issuance of the letter on December 4.

And so to suggest that someone else runs that office—well, let's just break it down, let's just suggest that the white boy runs the office and the brother just sits there and lets him run it—is offensive to me. I think it is racist, at best.

Mr. THOMAS. I have no further questions, thank you.

Mr. WEISS. Mr. Payne.

Mr. PAYNE. Thank you very much. I was just looking over some material, a little background on the fact that there has been a decline in the question of higher education of minorities. It says that the crisis in minority education continues, although the high school graduation rates of blacks, 76.1, now approaches that of whites, 82.1, disparage persists in every objective measure of African American college participation.

While 38.8 percent of whites, 18 to 24 year old are high school graduates who were enrolled in college, only 30.8 percent of the African American group were. While 55.8 percent of white college students received a baccalaureate degree after 5½ years, only 30.3 percent of black students did.

The proportion of bachelor's degrees received by blacks fell from 6.4, in 1976, to 5.7, in 1989. Master's degrees, from 6.8 to 4.6, and doctoral degrees, from 3.3 to 2.4. The absolute numbers fell as well. The percentage of professional degrees received by African Americans were virtually unchanged in the period, 4.3 to 4.4.

Then it goes on to say financial aid is a key element in black enrollment and graduation at institutions. Fully 82 percent of black undergraduate students in private colleges received some financial assistance, grants, loans, work studies, as do 72 percent of Hispanic undergraduates and 59 percent of Asians.

It goes on to talk about the dramatic rise in college tuition at private and public institutions, and the decline in the dollar value of Federal assistance, financial assistance, especially grant assistance. Scholarships are critical to the increase in participation rates of minority students who, because of persistent segregation and discrimination, disproportionately comprise those in low- and poor-income families.

The only reason I read that is because I'm trying to figure this out, too. I listen to the fact that you say you were not surprised, but more offended, because you did some very good work with DOJ and Texas. Then you went on to Alabama, you said, then on to Ari-

zona, went to Idaho on to Kentucky, and then on to North Carolina, and did a great job.

You know, I am as offended, I guess, as you are. Not because it's inferred that white boy runs the place, but I checked with the National Organization of Black Law Enforcement officials and—I was curious about your background, even before you read all of this—and the black law enforcement officials commended your former record.

That's why I'm totally surprised at almost the pride, it seems, that you take; almost the glee of this announcement. And believe it or not, the day that it was done, the next day, a tremendous number of calls went throughout the United States of America, because people were totally, I'm talking about black law enforcement people from the South, were shocked at this undertaking.

And that's why I said, yesterday, I knew it had to be someone else that wrote it, because I looked at your record. I am confused because there are less and less dollars from the Federal Government. And I think everyone believes we should encourage education. As I indicated yesterday—Mrs. Bush sits on the board at Morehouse College, and that's how Dr. Sullivan was discovered with his tremendous abilities, and asked to leave that prestigious institution to become the head of HHS.

I know of no one, white, black, conservative, liberal, who says that we need to really scrutinize this question of attempting to have a better reflection of American society in higher education. So I just don't understand this December 4 investigation. Why is so much energy and effort going into this narrow interpretation of the law?

The way you talk about correcting past discrimination, it's like a magic wand. Evidently, it's some wand that you put down and say that past discriminations have all been corrected because someone adjusts something, and I still don't know what it is.

You mentioned the Louisville institution, yesterday, as one of those that the Fiesta Bowl might have sent some dollars to assist minority students—Louisville, KY. There was a question whether discrimination had been totally eliminated, and, therefore, it would not be necessary to have any kind of correction through the affirmative action as a remedy of past discrimination.

I think you are more offended than surprised, I'm both, because I don't know what the intent is, I don't know what the thrust is, and as, I guess, as a brother to brother, since you inferred that there is some kind of racial thing—and I was the one that said it. So I'm just amazed.

I'm a former educator, and I think that the only way that we're going to get out of the dilemma that African Americans find themselves in is to have Headstart programs, where we can give people an opportunity to start on the same level, and to encourage them to stay in school, encourage them to go on to college.

I don't understand what is the thrust of the so-called civil rights arm of the Department of Education in seemingly thwarting, slowing down, and confusing something that is as American as apple pie. Maybe because I'm not a lawyer, and you are.

So perhaps you need to explain to me why this is so critical, and all of these other people that are going to be hurt because a Fiesta

Bowl wants to give some money to some black students who would, otherwise, not go to school; how this is violating the civil rights of some people out there?

Mr. WILLIAMS. Mr. Payne, if I could, I think, as we discussed yesterday, I share—and I will not attempt to speak for Dick, but I would imagine he does as well—I think we all would share the concern about the low number of all minority students, as well as Americans, that appear to be entering higher education at whatever level, whether it's undergraduate, graduate, or professional school, and share the desire that we increase the number of people who have an opportunity to participate in higher education.

And it's because of that, that it becomes very important that we insure that each person has an opportunity to go to college and have the financial resources to do so. You've mentioned a number of things, but you've also mentioned, in the course of your statement and question, as to all of the resources.

We would disagree that there are an enormous amount of resources that are going into this issue. This is one issue on policy agenda; it is one issue, in terms of National Enforcement Strategy. It has received more attention than most things that we are doing, but it is, indeed, not the biggest thing that we're spending our time with and our resources with.

But, I think, when we say, "Why?"—we have received more complaints in the last year, on this issue, than we have in the last 10. And so the reason for the December 4 letter was particularly as it relates to Louisville, but it was also because of a concern that maybe something is going on out there in the community that may deprive a number of students of the opportunity for financial assistance.

We have, as I outlined yesterday, and I will not attempt to do so again today, a number of instances, as I said, of complaints that individuals feel as if they have been deprived the opportunity for financial assistance that they would need in order to matriculate to a college campus, because of their race. And that is something that is extremely important for us, in a civil rights capacity, to be concerned about.

I can recall, from my own reading, Langston Hughes once told us that, "There's a dream with its back against the wall, and denied to one, denies it to us all." And if that Asian student or that Arab American student or that Hispanic student or that black student or even that white student is denied an opportunity to matriculate to a college because of the denial of financial assistance, that is something that, as civil rights enforcement officials, that we are charged by this Congress and charged by the law to be concerned about.

Mr. PAYNE. OK. On that point of the Fiesta Bowl money, which didn't occur before, and regardless of the reason for it being created at this time, up until 1990, there were zero dollars out of Arizona's Fiesta Bowl for minority students.

Mr. WILLIAMS. Correct.

Mr. PAYNE. December 1990, or whenever the bowl committee gets together, they say, "We have a new idea. We're going to not only send all this money to the schools for whatever, but we're going to put aside a couple of hundred thousand dollars just for

some poor, black kids who can't go to school. We know there's been cutbacks in the last education budget."

As you know, State incentive grants were reduced; State loans were reduced throughout the Nation, because the President sent up a budget that had less for scholarship aid than the previous year. So a group of people on a committee decide, "We're going to get some dollars, here, to help some student that may, then, be able to go to college, rather than to the army; or go to college rather than to work for a \$3.50 minimum wage job."

And you interpret it as, therefore, because there was zero dollars before, and they create \$50,000 or \$100,000 or \$200,000 that was never there before, to go to a minority student, that's discriminating against, this Asian, or this—

Mr. WILLIAMS. No. I went through it yesterday and—

Mr. PAYNE. Well, that's the way I understand it and that's why I stopped you right at that point. I don't tend to interrupt people. But I just wanted to see how the Fiesta Bowl violated someone's rights. I wonder how did this new money discriminate against someone else, because it seems to be the genesis of your project—and that's what I don't understand.

Mr. WILLIAMS. As we discussed yesterday, the reason for it is Louisville, it's not the Fiesta Bowl. The letter went to the Fiesta Bowl. They are not institutions of higher education and would not be presumed to know anything about title VI, but the participating universities, University of Louisville and University of Alabama, are, indeed, recipients of Federal education funds, and therefore, have to comply with title VI.

Their use of the money, by the University of Louisville, does, indeed, raise title VI questions. And, as I mentioned yesterday, the University of—

Mr. PAYNE. And as for the use of that private money to help some student that couldn't get in there—

Mr. WILLIAMS. The legal interpretation of the Office, at that time, and as we had used in other instances, was that a university's use of privately designated funds did, in fact, raise a title VI question. As a matter of fact, there have been a number of people that have suggested to us, after December 18, when we said you can use that privately designated funds, that that would be a violation of Civil Rights Restoration Act.

And so, yes, our interpretation on December 4 was that if a university used private funds, new money, that the way that they used it raised title VI concerns.

Mr. PAYNE. And you feel that that's really the intent of the law?

Mr. WILLIAMS. That's the way that I read and interpreted it on December 4, yes.

Mr. PAYNE. I could stay all afternoon, but I better yield back to the chairman.

Mr. WEISS. We'll be calling on the other members when we return. There's a vote on the floor, and we should be back in a matter of 10 minutes, or so. The subcommittee stands in recess.

[Recess taken.]

Mr. WEISS. The subcommittee is back in session. On May 22, 1990, William Smith, who was acting Director of OCR at the time, prepared a draft memorandum to OCR senior staff on race-specific

scholarships. The memorandum states that it will supersede all previous OCR policy. Do you know what prompted that memorandum?

Mr. KOMER. I don't believe William Smith had anything to do with that memo. I think that's one of the drafts of the policy document that was being prepared. Everything that's significant like that is prepared for the Assistant Secretary's signature. In that case it was the Acting Assistant Secretary, William Smith.

I believe, it was certainly my practice at EEOC, when I was legal counsel and our office was responsible for, among other things, developing policy documents, we always started out a new policy document that we intended to be broad based, that it superseded any existing policy, to make sure if there was policy out there, or somebody thought there was policy out there, that was contrary to the new document, that we would supersede it.

In this particular case, I don't think that there's any document that one could point to and say, "This is OCR's policy on race-specific scholarship." I think that that line is, essentially, surplus to the extent that anyone might take one of those earlier LOF's, or documents, and think that this is a policy document; you certainly have.

Mr. WEISS. What was your role in the drafting of the Smith memorandum?

Mr. KOMER. None, as far as I know. This document was in process, as I explained earlier, months before I arrived. And it was not initiated at my request, nor did I pass that document on to Acting Assistant Secretary Smith or to Michael Williams, subsequent to his arrival, in July.

Mr. WEISS. Would you say that there was a direct line between the work that the policy development group was doing, even before your arrival, through the draft memorandum from Mr. Smith to the December 4 statement, letter, whatever, from Mr. Williams?

Mr. KOMER. I don't understand what you mean, "a direct line."

Mr. WEISS. You've said that long before you got to the agency, in April 1990, there was this group in OCR that was working on policy development regarding minority scholarships. Then, on May 22, Mr. Smith, the Acting Assistant Secretary for Civil Rights, issues a detailed memorandum on recipient provision of race or gender-specific financial aid. And then, along comes Mr. Williams in July 1990, and come December, he issues the statement in December.

And the question is: Is there a continuity there? Mr. Williams, do you just make your decision off the top of your head, or do you, in fact, look at the statement from William Smith, the draft memo, do you look at the work that that policy development group was doing?

Mr. WILLIAMS. Mr. Chairman, I look at a full range of documents and materials that are prepared to assist the Assistant Secretary to know what may be the parameters of the law. Of course, one of the things that I looked at were the cases that relate to this matter, the policy documents that relate to this matter.

But I think it's important for us to remember that after the May 22, 1990, policy document, there were two other drafts, one on June 18, 1990, and one on July 23, 1990, that the committee has been

provided. And no policy document has been released to the public, or to our staff, as of this date.

Mr. WEISS. Except as of December 4. In fact, there was a policy statement issued, or communicated, to the promoters of the Fiesta Bowl.

Mr. WILLIAMS. We can recast that ground again. As I said, that was a letter that contained within it my interpretation of the law, as it relates to this subject. It was not the initiation or the announcement of policy.

Mr. WEISS. Thank you. Let me now call on Mr. Hobson.

Mr. HOBSON. Thank you, Mr. Chairman. I just have a couple of questions. Mr. Komer, on the one memo that you wrote, it looked to me, maybe contrary to the way it looked to some other people, what looked like a typical bureaucrat response. That you saw the thing, down there, and you said, "Boy, the quickest way to get rid of this and to let it die is to get it out of here, and write this memo, and it will go away," the one where you said, "you might want to look at this." That's what those look like, to me, when I see them.

Mr. KOMER. It was not an effort to just let it die, on my part. Although, I have to admit, when I issued that memo—I got it on April 27, I started on April 9—I viewed it as fairly routine, in the sense that it said "consider" this issue for a compliance review.

We've done other sorts of things like that. I mean, we did one involving Selma, AL, in August, about ability grouping, which is another issue that's on our National Enforcement Strategy and was on our policy agenda. I think it was a fairly routine thing to send it down.

And I had no expectation, as I said before, since they were under a travel freeze, which I fully expected to run through the end of that fiscal year, until September 30, I didn't think anybody was going to be doing any compliance reviews, when I was writing that memo in April, until the next year, at the best.

Mr. HOBSON. Do you want to make any comment about the Federal Register, I'm not quite sure—

Mr. KOMER. We took advantage of the break to look at the Administrative Procedures Act, because I was curious as to why your reading of the act and my understanding of the act seemed to be so divergent.

And I believe, the problem is that, yes, the definition of "rule" includes things like interpretations, but that definition is in 5 USC section 551. In USC section 553, it states which rules must be published in the Federal Register. It says, "except where required by statute," and our statute, title VI, does not require publication of anything other than regulations.

It states that, "Except when notice or hearing is required by statute, this subsection does not apply to interpretative rules, general statements of policy, or rules of agency organization procedure or practice." In other words, yes, what we issued could be considered a rule, but, no, I don't think it's subject to publication in the Federal Register.

Mr. WEISS. Do you think that the statement that we referred to earlier, that "the Office for Civil Rights will, hereafter, publish all major policy determinations," that that doesn't apply any longer because that was an HEW—when the Department of Education

was located—You don't think that that requires a direct rescission, if it's not to be applicable any longer?

Mr. KOMER. No, I don't think so. After the Department of Education was established, we reissued all of our rules and regulations.

Mr. WEISS. Say that again.

Mr. KOMER. After the Department was established in 1980, we went through a process of reissuing all of our rules and regulations in our own title of the Code of Federal Regulations, and I don't believe we've reissued that notice. It is possible that I'm wrong, but if so, we have certainly honored that policy in the breach. And, in fact, I am sure—

Mr. WEISS. My understanding is that, in fact, it has to be rescinded.

Mr. KOMER. I think it dies a natural death when the Office of Education is split off from the Department.

Mr. WEISS. Clear disagreement, a misunderstanding of one of us, as to what the law is.

Mr. HOBSON. Maybe that's something that ought to be cleared up. But, I would just like to say one other thing. Yesterday, somehow I was characterized as castigating Mr. Williams, and I didn't mean to do that. What I meant to point out was that I thought that there was, at least, a lack of sensitivity or thought, of stepping back from what you were doing and looking at the overall effect that some people may construe, as to what you were doing, in the wrong light.

I think I iterated that I happen to believe that there needs to be some help for people who find themselves in circumstances, such as the people that I try to work with at the university that I'm on the board of. And if anything comes out of this, the positive along that line is that we all have to look at things, sometimes we get involved—and I know you have a strong background, and I knew that before—but sometimes I think we have to look beyond the immediacy of what we're doing.

And I wanted to give you a chance to comment on that. I know we've got another vote apparently, which they told me we weren't going to have for a while. But if you want to make any comment about that, Mr. Williams.

Mr. WILLIAMS. Congressman, first of all, thank you for the opportunity of addressing it, but in addition to that, I share, as I mentioned to you yesterday, the need for us to be sensitive as we approach the area of applying the law.

One of the reasons, quite frankly, while I think the Department and OCR and myself are excited about how the Secretary's handling this issue, is because in the course of the process of developing what will be the policy, as it relates to it.

I think I feel quite comfortable that that is indeed the leadership that we'll receive from the Secretary; that he is, indeed, very concerned about No. 1, that we provide opportunities for all students, and No. 2, that we do it in a way that involves a wide number of people in the process; and that, finally, that we send a message to students and their parents that is the kind of message that says that we want a wide variety of people included in the opportunities of advancement for society. And so that is a position that I share, and I think that the balance of OCR shares as well.

To the extent that our actions, or my actions, on December 4 conflict with that, we can say, quite frankly, that it was not our intention, but, as they say, "Of all great plans of mice and men, sometimes, indeed, they do go astray," and that may be one that did. And I appreciate the opportunity to address that, for myself and for the balance of OCR.

Mr. HOBSON. Thank you, Mr. Chairman.

Mr. WEISS. Thank you, Mr. Hobson. We have just a little bit more to go, but we do have to take a break for a vote, at this point, we'll come back in about 10 minutes.

[Recess taken.]

Mr. WEISS. The subcommittee is now back in session. I think that that was the last vote for the day, hopefully. And I have just a few more questions.

Mr. Komer, did you inform Mr. Williams, at any time, that you thought the Fiesta Bowl case was being mishandled, that it should be done in another way?

Mr. KOMER. It wasn't a case, but, yes, in the memo that I transmitted. When I transmitted, to him, a draft letter to the Fiesta Bowl, I indicated that he might want to call the Fiesta Bowl, as opposed to send the letter. I also told him that I thought we should avoid intervening with respect to the Fiesta Bowl.

I told him that I thought the legal position stated in the letter was appropriate, but that I thought we were going to get a significant amount of public interest in what we would have to say, and that I didn't think we were really ready to deal with that.

I also advised against, if we wanted to send a letter including a press release, publicizing the letter. I even told him that I thought if we did it that way, we would be in hearings in January. I'm afraid I underestimated Chairman Hawkins. I hadn't realized he was retiring on January 2, and so he set a hearing for December. But that was what I advised the Assistant Secretary.

Mr. WEISS. Did you inform Mr. Williams, at the time, that advanced notice should be given to the colleges affected, that perhaps more public notice should have been involved.

Mr. KOMER. No. I did allude to the fact that we were developing a policy and that I felt we should do it as a policy, as opposed to sort of start going out and talking to the Fiesta Bowl. However, I'm much more cautious than the Assistant Secretary, in some ways. And he comes from a part of the Civil Rights Division at Justice, which does, in fact, undertake investigations and such, on the basis of things like this, as matter of course, without having a complaint. It's just a temperament difference between us, I suppose.

Mr. WEISS. It's the difference between trial lawyers and corporate lawyers, I guess.

Mr. KOMER. I guess you could say that. I'm certainly not a litigator, as you can see.

Mr. WEISS. Did you inform him in writing?

Mr. KOMER. I sent him, attached to the written memo that you have, a handwritten, little white sheet of paper with what I had to say on it. And as is his normal course of business, he threw it away. I do this a couple of times a day, and he throws them away a couple times a day. And sometimes he follows them, and sometimes he doesn't.

Mr. WEISS. Well, that gives me a good response to my next question, which is why the subcommittee didn't receive it. In fact, isn't it true that the first public announcement that minority scholarships were illegal came in the Fiesta Bowl case?

Mr. KOMER. Well, the first public announcement in 1990—as I think is apparent, I happen to believe that the regulations can be read in such a way that they make many illegal. I think the voc-ed guidelines make many sorts of them illegal. Both of those are public documents.

I think the implication of our policy interpretation on *Bakke*—if I were a university attorney, and I read the policy interpretation on *Bakke*, I would not advise my client, the university, to set up race-restrictive scholarships in situations where I was not prepared to acknowledge discrimination by my own university, but I'm a cautious sort of guy.

Mr. WEISS. Mr. Komer, since you alluded to the *Bakke* interpretation, and you couldn't find it when we were questioning, have you located it yet?

Mr. KOMER. Actually, when I had said that, I was looking for the voc-ed guidelines, which were published after *Bakke*, and that provision I have found, I believe you had found it yourself.

But it reads, under student financial assistance—and these guidelines do apply to vocational education programs in higher education institutions—it says, "Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination."

Mr. WEISS. Again, that's according to vocational education.

Mr. KOMER. These are the voc-ed guidelines, which were published in the Federal Register on March 29, 1979.

Mr. WEISS. 1979.

Mr. KOMER. 1979, the year after *Bakke*. And they form, I believe, appendix B, to the title VI regulations. And so they are published in the Code of Federal Regulations and readily available to anyone who cares to find out—

Mr. WEISS. Now, how do you square that with Federal Register, October 10, 1979, which is the policy interpretation from the Office for Civil Rights. And this is on the *Bakke* case; it's a summary of policy interpretation.

I'm going to quote part of it:

The Department has reviewed the Supreme Court's decision in *Bakke* and has determined that voluntary affirmative action may include, but is not limited to, the following: consideration of race, color, or national origin among the factors evaluated in selecting students; increased recruitment in the minority institutions and communities; use of alternative admissions criteria when traditional criteria are found to be inadequately predictive of minority students' success; provision of preadmission compensatory and tutorial programs; and the establishment and pursuit of numerical goals to achieve the racial and ethnic composition of the student body the institution seeks.

Mr. KOMER. How do I square that? Well, I guess I read the other part, too, that talks about things like "offering special services, including summer institutes and special tutoring services to assist educationally and socially disadvantaged students in meeting admissions requirements."

And then it says, "Students may not be excluded from these programs on the basis of race, but race may be considered as a factor in selecting participants."

Mr. WEISS. And it says, "voluntary affirmative actions," and that's the part that I read. In any event, I think that, quite clearly, without wanting to preclude whatever the Secretary may decide to do—his indication is that he is going to determine what the policy ought to be. In the mean time, everything is on hold. Quite clearly, he thinks that the announcements, in December, indicated a policy change.

You would agree, Mr. Komer, would you not, that the universities and colleges, the institutions of higher learning, having had nothing really public, by way of pronouncement, other than since the *Bakke* interpretation that I just read from, would have had reason to be surprised and shocked at the December announcements?

Mr. KOMER. I think that they certainly were shocked, to the extent that they simply had been going along a path that I think was—I think the data that you've been given showed a increasing use of these sorts of devices, without any interruption by the Office for Civil Rights.

I think that that is, unfortunately, what has gotten us where we are today, which is this Office for Civil Rights failed in its duty to issue a policy on this topic long ago. And as a result, there have been varying interpretations before *Bakke*, before the regs were amended, to add voluntary affirmative action to them.

You know that provision was not there from 1965, when the regs were written, until it was added in 1973. I think many of the college presidents who have discussed what we said in December, with amazement, have also indicated that it was only recently that they started to think these things were legal. And they've only started to do them fairly recently.

I think that's because of a failure of OCR to have issued policy. I, personally, am a big believer in issuing policy that is, through the National Enforcement Strategy that Mr. Williams issued in December, and was totally overtaken by this Fiesta Bowl fiasco. It's intended to address a lot of issues that have been left unaddressed for years, and that have allowed noncompliance, in a number of areas, like ability grouping, services for limited English-speaking students, a lot of areas like that, to go unremedied.

I, personally, believe that, to the extent a Federal enforcement agency, such as OCR, clearly announces what it thinks the law requires a very large proportion of recipients of Federal funds from our Department will voluntarily comply with the law. We will not have to utilize administrative enforcement, or referral to the Department of Justice. I am a believer, here and in my previous incarnations at EEOC, in issuing policy, developing policy.

Mr. WEISS. Getting public comment on policy changes?

Mr. KOMER. Where feasible and where necessary. I think that one thing you should know is that in the confirmation process, Mr. Williams committed to consulting with civil rights groups and other interested parties affected by what the Department does. I have sat in on some of those meetings. But he has met with many

civil rights groups and a number of other groups to try and discuss their concerns and what they would like to see OCR do.

This is not conspiracy, it's not conspiratorial; people know about it. People know that he's met with people from the Heritage Foundation. They may not be aware that he's met with people from the NAACP Legal Defense Fund repeatedly. But these meetings go on, and OCR is far more open to the public groups affected by our activities than has been true for a decade.

I hate to see the fact that we got into the Fiesta Bowl thing overshadow the greater openness at OCR these days, the greater willingness to confront difficult issues. These are not simple issues, and they're not issues where we don't have resistance from within the Department as to what the law is. I believe this sincerely, and I know that the Assistant Secretary does.

Mr. WEISS. Well, I thank you, Mr. Komer. The provisions of law that we've been operating under—civil rights' thrust has been to try to encourage voluntary affirmative action programs, and in some cases, to mandate affirmative action programs. And I just find it mightily strange that at a time when we're all concerned about how much slippage there is in the minority communities as far as levels of higher education are concerned, that a major thrust of the Office for Civil Rights is to, in fact, make it more difficult for voluntary affirmative action programs to occur.

And I must say, Mr. Williams, that your having annunciated your concern that, in essence, there are people who are affected adversely, of the nonminority groups, when, in fact, minority groups are given a benefit, I think is probably in conflict with the position of the Secretary. That's something that I think you all are going to have to work out.

And finally, I should say that I think that your record as a civil rights prosecutor is admirable, and I have nothing but the highest regard for it. But it seems to me that having demonstrated excellence in one area of civil rights doesn't necessarily mean that, philosophically, you are on the right side, and that you really are moving in the right direction in the area that you're now engaged.

Again, I appreciate your participation and your's, Mr. Komer. There may be other members who have questions, and they may submit questions, in writing, to you. Whatever documents we've referred to will be entered into the record, without objection.

And the subcommittee now stands adjourned, subject to the call of the Chair.

[Whereupon, at 5:20 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

JAMES C. DUFFY AND J. R. MICHELA
1990-1991

CARDEN COLLEGE KILGORE
CLARK EMIL, JR. OKLAHOMA
HOLMES JAMES W. WASHINGTON
TID WILSON NEW YORK
WELLS STAN OKLAHOMA
STEPHEN L. NEAL NORTH CAROLINA
BLOOM BARBARA JR. ALABAMA
CLARK JAMES JR. ALABAMA
ROBERT E. WISE JR. WEST VIRGINIA
BARBARA BAKER CALIFORNIA
MAYNARD OWENS NEW YORK
GILBERT J. WILSON NEW YORK
JIM EDDIE NEW ALABAMA
GERALD W. FLEZDA MISSOURI
ALBERT B. BUELA-MANTE TEXAS
MATTHEW B. MARTINEZ CALIFORNIA
HOWARD M. FAYE NEW JERSEY
LARRY GIBBS CALIFORNIA
PATRIC C. SMITH, NATHAN
PAT THORNTON ARIZONA
COLLEGE C. PETERSON, JENNIFER SOTA
COLLEGE L. S. SMITH CONNECTICUT
COLLEGE L. L. LUMIN
JAMES W. TICE JR. ALABAMA

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 SCOTT L. KILGUS, WISCONSIN

SEWARD SANDERS, VERMONT
and elsewhere

DISCUSSION

MAJORITY—(103) 225-6001

OPENING STATEMENT OF CONGRESSMAN CRAIG THOMAS
RANKING REPUBLICAN MEMBER, SUBCOMMITTEE ON HUMAN RESOURCES and
INTERGOVERNMENTAL RELATIONS
March 20, 1991

MR. CHAIRMAN; I WANT TO THANK YOU FOR HOLDING THIS HEARING TODAY. THERE ARE FEW ISSUES IN THIS COUNTRY AS IMPORTANT AS GUARANTEEING QUALITY EDUCATIONAL OPPORTUNITIES FOR ALL AMERICANS. THE HEARING THIS MORNING, COMBINED WITH THE ANNOUNCEMENT FROM THE DEPARTMENT OF EDUCATION, WILL GIVE US A GOOD OPPORTUNITY TO LOOK INTO THIS MATTER.

CIVIL RIGHTS IS AS COMPLICATED AN ISSUE AS WE WILL FACE DURING THIS CONGRESS. IT HAS BEEN PLACED AT THE TOP OF MANY AGENDAS, ALBEIT FOR DIFFERING REASONS. BUT AN IMPORTANT POINT NEEDS TO BE MADE CLEAR...BOTH PRESIDENT BUSH AND CONGRESS ARE COMMITTED TO EQUAL OPPORTUNITIES IN EMPLOYMENT, EDUCATION AND HOUSING. DIFFERENCES ON HOW TO ACHIEVE THESE GOALS CAN NOT, AND SHOULD NOT, BE CONSTRUED AS DISAGREEMENT OVER THE GOALS THEMSELVES.

THE DECISION BY MR. WILLIAMS IN THE OFFICE OF CIVIL RIGHTS, AND THE SUBSEQUENT STATEMENTS TWO WEEKS LATER, DID CREATE SOME CONFUSION. I AM PLEASED THAT MR. WILLIAMS IS HERE TO DISCUSS HIS DECISION.

I AM ALSO PLEASED WITH EDUCATION SECRETARY ALEXANDER'S

DECISION TO BECOME ACTIVE IN THIS ISSUE TO ENSURE THAT THE NEEDS OF ALL AMERICANS...REGARDLESS OF COLOR, SEX OR NATIONAL ORIGIN... ARE MET AND THEIR RIGHTS PROTECTED. HIS STATEMENT THIS MORNING DETAILING THE PROCESS THE EDUCATION DEPARTMENT INTENDS TO FOLLOW IN REVIEWING THIS ISSUE APPEARS TO PROVIDE A SOLID FOUNDATION UPON WHICH TO BUILD A CONSENSUS ON THIS ISSUE. IT WILL PROVIDE A MUCH NEEDED OVERVIEW OF THE CURRENT PROGRAMS, ENCOURAGE THE PARTICIPATION OF OUTSIDE GROUPS AND CONGRESS IN DECIDING HOW TO IMPROVE OUR EFFORTS, AND PROVIDE PROTECTION TO BOTH INSTITUTIONS AND RECIPIENTS WHO ARE ALREADY BENEFITTING FROM CURRENT PROGRAMS.

THE SECRETARY HAS A WELL-DESERVED REPUTATION AS BEING A LEADER IN THE FIELD OF EDUCATION, BOTH FROM HIS DAYS AS GOVERNOR OF TENNESSEE AND MORE RECENTLY AS PRESIDENT OF THAT STATE'S LARGEST UNIVERSITY SYSTEM. HE BRINGS WITH HIM A FRESH PERSPECTIVE TO A DIFFICULT JOB AND A DIFFICULT ISSUE.

I AM CONFIDENT THAT HIS FORTHRIGHT MANNER WILL PRODUCE RESULTS ALL OF US CAN AGREE UPON. ALTHOUGH HE WAS JUST SWORN IN ON MONDAY, HE HAS EXPRESSED A HOPE OF COMPLETING THIS PROJECT WITHIN SIX MONTHS. WE SHOULD GIVE HIM TIME TO COMPLETE HIS TASK. I KNOW CONGRESS AND THIS COMMITTEE ARE WILLING TO COOPERATE IN THESE EFFORTS, AND LOOK FORWARD TO A REPORT ON HIS FINDINGS IN THE MONTHS AHEAD.

ONCE AGAIN, MR. CHAIRMAN, THANK YOU FOR HOLDING THIS HEARING. I LOOK FORWARD TO HEARING THE TESTIMONY FROM EACH PANEL, AND AM PARTICULARLY INTERESTED IN HEARING THEIR COMMENTS ON THE ADMINISTRATION'S PLAN RELEASED THIS MORNING.

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STATEMENT BY REPRESENTATIVE PATSY T. MINK
HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
COMMITTEE ON GOVERNMENT OPERATIONS
HEARING ON RACE-SPECIFIC SCHOLARSHIPS POLICY
MARCH 21, 1991

Mr. Chairman I am pleased that you have called this hearing on the important issue of the Department of Education's policy on minority scholarships. I apologize for not being able to be here yesterday, however, a markup in the Education and Labor Committee kept me away.

Mr. Chairman, this is a very important issue to me and the people of my district. With many of the students in Hawaii eligible for minority-based financial aid, any new standards or regulation restricting the use of minority scholarships would severely affect the students in my district.

However, this is not an issue that concerns me only because of the effect it would have on Hawaii. It is the fundamental principle that a college education should be available to every student in our country, no matter what their race, national origin or gender. There is no doubt that race-specific scholarships are important in helping minority students overcome

many cultural and economic barriers to getting a college education. Many times these scholarships are the only means that allow minority students to attend college. It perplexes me that the Department of Education would make such a drastic change in policy that will effect thousands of students across the nation, without consideration of the devastating consequences it will have on these students.

I think we all agree that the way this sensitive issue was handled by the Department has created irreparable damage, in the civil rights community, on college campuses and in the minds of students across our nation.

I look forward to hearing the testimony today and hope that it will help our efforts to understand the reasoning behind this sudden change in Department of Education policy and the process used to make this change.

OPENING STATEMENT
CONGRESSMAN DONALD M. PAYNE
TENTH DISTRICT, NEW JERSEY

RACE-BASED SCHOLARSHIPS

MR. CHAIRMAN, I WANT TO COMMEND YOU FOR
CALLING THIS HEARING TODAY ON AN ISSUE OF
VITAL IMPORTANCE TO MINORITY STUDENTS AND
EDUCATIONAL INSTITUTIONS ACROSS AMERICA.

SINCE THE FIRST PRESS RELEASE QUESTIONING
THE CONSTITUTIONALITY OF MINORITY
SCHOLARSHIPS WAS ISSUED LAST DECEMBER,
UNIVERSITIES, COLLEGES, AND THOUSANDS OF
STUDENTS HAVE HESITATED UNDER THE CLOUDED
EDUCATIONAL POLICY.

AT THIS HEARING, I HOPE TO DETERMINE THE
INTENT BEHIND THE DEPARTMENT OF
EDUCATION'S ACTIONS, BECAUSE I THINK WE
NEED TO BE VERY CAREFUL IN THE KINDS OF
MESSAGES WE SEND OUR MINORITY STUDENTS WHO
ARE CONSIDERING ATTENDING COLLEGE.

AT A TIME WHEN AFRICAN-AMERICANS ARE
RETURNING FROM THE PERSIAN GULF IN NUMBERS
FAR BEYOND THEIR PROPORTIONATE
REPRESENTATION IN SOCIETY, WE MUST ASK WHY
THEY ARE OVERREPRESENTED IN THE
BATTLEFIELD BUT UNDERREPRESENTED IN THE
CLASSROOM.

AS A MEMBER OF THE COMMITTEE ON EDUCATION AND LABOR, I AM FAMILIAR WITH THE PROBLEMS UNIVERSITIES AND COLLEGES HAVE ATTRACTING AND RETAINING STUDENTS OF COLOR. THIS, COMPOUNDED WITH A HISTORY OF DISCRIMINATION, NECESSITATES A CLEAR AND IMMEDIATE RESPONSE FROM THE DEPARTMENT OF EDUCATION REGARDING RACE-BASED SCHOLARSHIPS.

I AM TROUBLED BY THE STATISTICS WHICH DEMONSTRATE THAT MINORITY EDUCATION IS IN A STATE OF CRISIS.

THE PROPORTION OF BACHELOR'S DEGREES RECEIVED BY BLACKS FELL FROM 6.4% IN 1976 TO 5.7% IN 1989. THE NUMBERS OF BLACKS RECEIVING MASTER'S DEGREES AND DOCTORATES ALSO DECLINED SIGNIFICANTLY, ALTHOUGH THE GENERAL BLACK POPULATION CONTINUED TO INCREASE.

THEREFORE, MR. CHAIRMAN, I HOPE OUR WITNESSES WILL BE ABLE TO CLARIFY THE PROBLEM AT HAND AND SUGGEST SOLUTIONS TO THIS NATIONAL CRISIS. I WELCOME OUR WITNESSES AND LOOK FORWARD TO HEARING THEIR TESTIMONY THIS MORNING.

STATEMENT OF THE HONORABLE ROSA L. DELAURO
SUBCOMMITTEE ON HUMAN RESOURCES AND
INTERGOVERNMENTAL RELATIONS
MARCH 20, 1991

Mr. Chairman, I commend you for holding this hearing on the Department of Education's policy regarding minority scholarships.

Since the Department of Education announced their new policy regarding race-specific scholarships, there has been much criticism by educators, students, professors, Members of Congress -- the list goes on and on.

Many of the complaints are concerned that this change will reverse more than twenty years of government policy to enhance minority enrollment in higher education.

I am disturbed that this policy, whether used now or four years down the road, will discourage minority students from even thinking about a college education.

Several colleges and universities in my state of Connecticut have expressed similar concerns about the Department of Education's changes to existing policy. They

feel that minority students may get the wrong idea about what kind of financial aid is available to them. In their confusion, they may avoid a higher education.

This concerns me greatly in light of the fact that the State of Connecticut's Board of Governors for Higher Education just announced that minority student enrollment rose 5 percent to a record 19,572 from the fall of 1989 to fall 1990.

What message is being sent to these students? I only hope that the Department of Education will rethink this issue to ensure that our country's education policy moves ahead and not two steps behind.

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